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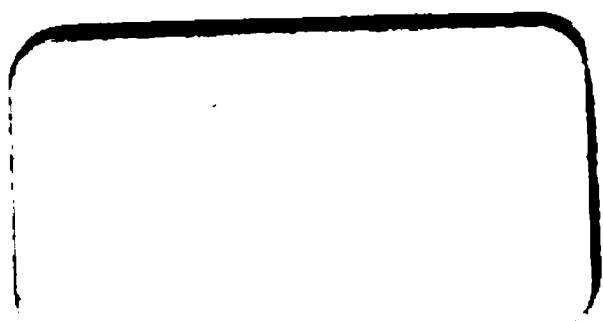
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36

VOL. 74—INDIANA REPORTS.

1881 . 36
REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

**WITH TABLES OF THE CASES REPORTED AND CASES
CITED, AND AN INDEX.**

BY FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 74,

**CONTAINING CASES DECIDED AT THE MAY TERM, 1881, NOT
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. GEORGE V. HOWK.*†

HON. JAMES L. WORDEN.†

HON. WILLIAM E. NIBLACK.†

HON. BYRON K. ELLIOTT.‡

HON. WILLIAM A. WOODS.‡

*Chief Justice at the May Term, 1881.

†Term of office commenced January 1st, 1877.

‡Term of office commenced January 3d, 1881.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. HORATIO C. NEWCOMB.†

HON. JAMES I. BEST.†

*President at the May Term, 1881.

†Appointed April 27th, 1881.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
JONATHAN W. GORDON.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
FREDERICK HEINER.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1881, IN THE SIXTY-FIFTH
YEAR OF THE STATE.

No. 8882.

MILLER *v.* THE STATE.

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CRIMINAL LAW.—Murder.—Evidence, Insufficiency of to Sustain Conviction.

—Where, on the trial of a defendant indicted for murder, the evidence tended to show that the accused was at his home, and that the deceased had followed him there for the purpose of forcing him into a fight, and that in the altercation the deceased, in assaulting the accused, was fatally stabbed by him, such evidence is insufficient to sustain a conviction of the crime of murder in the second degree.

SAME.—Self-Defence.—Assault.—Justifiable Homicide.—It is not necessary for one to flee from his home to avoid a fight thrust upon him by an assailant, in order to justify or excuse a homicide resulting therefrom. Being without fault, and in a place where he has a right to be, if violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable.

From the Clay Circuit Court.

W. W. Carter, S. D. Coffey and S. W. Curtis, for appellant.

D. P. Baldwin, Attorney General, *C. E. Matson*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

Miller v. The State.

Howk, C. J.—In this case the appellant was indicted for the unlawful homicide of one Joseph Ellison, at Clay county, on the 16th day of March, 1880. The indictment contained three counts. The first charged the appellant with murder in the first degree, the second count charged him with murder in the second degree, and the third count charged him with manslaughter. His motions to quash the several counts of the indictment were sustained as to the third count, and overruled as to the first and second counts of the indictment, and to the latter rulings he excepted. Upon arraignment the appellant's plea to the indictment was that he was not guilty as therein charged. The issues joined were tried by a jury, and a verdict was returned finding him guilty of murder in the second degree, as charged in the indictment, and assessing his punishment at imprisonment in the State's prison during life. His motion for a new trial having been overruled, and his exception saved to this ruling, the court rendered judgment on the verdict.

In this court the only error relied upon by the appellant for the reversal of the judgment below is the decision of the trial court in overruling his motion for a new trial. Many causes were assigned in this motion for such new trial, but of these we will consider such causes only as the appellant's counsel have presented and discussed in their elaborate brief of this case. The first point made by the appellant's counsel, in argument, arises under the third cause assigned for a new trial, namely, "The verdict is contrary to the law and the evidence." It is earnestly insisted by counsel that, in the killing of Joseph Ellison, the appellant was not guilty, under the evidence adduced upon the trial and the law applicable thereto, of murder in the second degree, but, at the most, was guilty of no higher grade of unlawful homicide than voluntary manslaughter.

In section 7 of the felony act of June 10th, 1852, it is provided that "If any person shall purposely and mali-

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ciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree," etc.

In section 8 of the same act, it is declared that "If any person shall unlawfully kill any human being without malice express or implied either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter," etc. 2 R. S. 1876, p. 426.

With these statutory definitions before us of murder in the second degree and manslaughter, we proceed now to the consideration and decision of the question presented and discussed by the respective counsel, of the sufficiency of the evidence, under the law, to justify or sustain the appellant's conviction of the crime of murder in the second degree. We deem it necessary to a clear and intelligible presentation of this question, and to the proper understanding of the grounds of our decision thereof, that we should give, in this connection, a summary at least of all the evidence adduced upon the trial.

Matilda Miller, a witness for the State, testified that she lived at Carbon, in Clay county, on March 16th, 1880; that on that day, between 3 and 4 o'clock P. M., Joseph Ellison came to her house and said that he wanted to warm, and took a seat by the fire. Appellant came to her house on the same day, about half an hour after Ellison, and put up his team, and took a seat by the fire. Witness heard no conversation between them; they sat there about fifteen minutes without speaking to each other. In ten or fifteen minutes they got up to fight. Joseph Ellison sat near the fire-place, and defendant took a seat near him. Ellison threw his head over against defendant's breast, and told him that he had to fight. Defendant said he had nothing against him, and didn't want to fight him. Ellison swore he had to fight. Defendant put his right hand on Ellison's shoulder and said, "Joe,

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I don't want to fight you." Witness then went out of the room, and when she saw that Ellison was hurt she gave the alarm. When Ellison was stabbed, he went out of the door into the middle room. He came back with his fist drawn, and said, "Let me to him ! Let me kill him !" and he then fell on the floor and died.

On cross-examination the same witness further testified in regard to the transaction, that Ellison butted the defendant with his head pretty severely, and then put his hands up to his breast. Defendant's right hand was on Ellison's left shoulder ; can't say whether he tried to push him away or not. Ellison began to rise up first. Witness saw no licks struck by either ; the last words that she heard defendant speak were that he did not want to fight. Ellison swore twice that defendant should fight.

Mahlon Miller, a witness for the State, also testified concerning the homicide, that Ellison butted the defendant in the breast, and asked him if he wanted to fight. Defendant put his hand on Ellison's head and pushed him back. They got up, and I saw the defendant strike him. This was but a short time after Ellison had sworn that the defendant should fight. At the time the defendant struck him, Ellison had put his hand back to his pocket as if he was trying to get something. Defendant said he did not want to fight, but would fight if he had to. Ellison put his hand to his pocket just as he rose ; then defendant struck him with a knife. I didn't notice where Ellison had his other hand. Defendant was standing in front of Ellison when the blow was given.

On cross-examination this witness testified that he went with his brother to Isaac Miller's, at his request. "We did not know that Ellison was there ; had last seen him at Nat. Priest's saloon. The first word spoken was when Ellison asked defendant if he didn't want to fight. Defendant said that he had nothing against Ellison, and didn't want to fight him. Defendant struck Ellison in the left breast with the

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knife ; don't know whether Mrs. Miller saw the lick or not. When Ellison was struck, he ran out of the room, and then came back and said, 'Let me to the son of a bitch !' The knife used was a common pocket knife. I saw my brother open the knife before he jumped up. He took it out of his pocket after Ellison said that he must fight."

This was all the evidence given by the State concerning the homicidal act. On this subject the defendant testified in his own behalf, in substance, that he saw Ellison on the 16th day of March, 1880 ; "I was working on that day for Isaac Miller ; Ellison was quarreling with Ben. Dickey ; I remarked that they wouldn't fight ; then Ellison wanted to fight me ; I refused to fight him, and went away to my work ; I went home to Isaac Miller's about 4 o'clock in the evening ; Ellison was there, sitting by the fire ; in a short time he pushed me with his head, and swore that I should fight him ; I didn't want to fight him, but he swore that I should, and then we both raised up ; he made a motion as if to draw a revolver, and I drew my knife ; I struck him in the left breast ; I didn't intend to kill him, but only to disable him so that I could get away ; he was much larger and stronger than I, and I was afraid of him ; I was afraid to run, for fear he would shoot me ; I knew he was in the habit of using weapons ; * * * * when I went to the house that day, I did not know that Ellison was there ; I had no malice or ill-will against Ellison."

The foregoing was all the evidence adduced upon the trial of this cause, which has any material bearing on the subject, grade and character of the homicide. The question arises, and it is an important and controlling question in this case, was this evidence sufficient, under the law, to show that the appellant, in the killing of Joseph Ellison, was guilty of murder in the second degree, or did it justify or sustain the appellant's conviction of that grade of criminal homicide? We need not, and do not, discuss this question. It

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seems very clear to us that the evidence wholly fails to sustain the conviction of the appellant of the crime of murder in the second degree. Indeed, it may well be doubted, we think, from our reading of the evidence, whether or not it tends to show that, in the killing of Ellison, the appellant was guilty of any grade or degree of criminal homicide. The evidence tends to show that the appellant was at his home, where he had the right to be, and that Ellison had gone there for the purpose of forcing him into a fight. It was not necessary that the appellant should flee from his home in order to avoid the fight thus thrust upon him. There is nothing, at least in modern law, which would require such flight in order to justify or excuse a homicide resulting from such enforced fight. Thus, in *Runyan v. The State*, 57 Ind. 80, this court said that "the tendency of the American mind seems to be very strongly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life. * * * The weight of modern authority, in our judgment, establishes the doctrine, that, when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable." And see the authorities there cited, and *Agee v. The State*, 64 Ind. 340.

For the reasons given we are of the opinion that the court clearly erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to sustain the motion for a new trial. The clerk of this court will notify the warden of the proper prison to return the appellant to the sheriff of Clay county.

The Board of Commissioners of Jay County v. Brewington.

No. 7685.

THE BOARD OF COMM'RS OF JAY COUNTY v. BREWINGTON.

PRACTICE.—*Complaint.*—*Descriptio Personæ.*—*Medical Services to Paupers.*—In a complaint for medical services to paupers, rendered at the request of the trustee of a township, the word “as” before the official title, “trustee of Jackson township,” is not necessary to show that he acted in his official capacity.

SAME.—*Services of Assistant.*—Services rendered by an assistant may be proved as part of the claim sued on.

EVIDENCE.—*Poor-Books.*—Entries in the poor-books of a township are admissible in evidence, although made up from memoranda made at the time of the transaction.

SAME.—*Testimony of Trustees.*—Parol testimony of township trustees is competent evidence to prove an employment to treat paupers.

SAME.—*Instructions.*—*Preponderance of Evidence.*—An erroneous definition of the preponderance of evidence, followed by proper qualifying words, will not tend to mislead the jury.

SAME.—It is not error to instruct the jury that if they find for the plaintiff they should “ascertain from the evidence of the witnesses the value of the services by him rendered, and allow him the value of the services for which he is entitled to recover, as ascertained by the evidence of the witnesses who have testified as to the value of such services.”

PRESUMPTION.—*Value of Services.*—Services rendered upon proper request are presumed to be of some value.

From the Jay Circuit Court.

J. M. Haynes, J. W. Headington and J. J. M. LaFollette,
for appellant.

T. Bosworth, for appellee.

FRANKLIN, C.—Appellee brought suit against the board of commissioners for medical and surgical services to paupers in the county, under employments by township trustees.

The defendant filed a demurrer to the complaint; overruled by the court, and excepted to by the defendant.

The defendant then answered:

1st. A general denial.

2d, 3d and 4th special paragraphs of answer filed; but, as no question is raised in this court upon either of them, they need not be stated.

The Board of Commissioners of Jay County v. Brewington.

Trial by jury. Verdict and judgment for plaintiff for \$130.

Motion and reasons filed by defendant for a new trial; overruled, and excepted to.

Bill of exceptions, embracing evidence, filed, and cause appealed to this court.

Appellant has assigned, in this court, two errors: overruling the demurrer to the complaint, and overruling the motion for a new trial.

The first paragraph in the complaint reads as follows, to wit:

“Comes now William J. Brewington, plaintiff, and complains of the board of commissioners of said county of Jay, and says that said Jay county is indebted to him in the sum of one hundred and thirty-six dollars on an account, an itemized statement of which is filed herewith and made a part of this paragraph, and marked ‘Exhibit A,’ for medical and surgical services rendered to one David Lanning, a resident pauper of Jackson township in said county; that said services were rendered at the special instance and request of Isaac Jordan, trustee of said Jackson township; that, at the time said services were rendered, there was no physician employed by the board of commissioners of said county, whose duty it was to render medical and surgical service to the paupers of said county; that said claim is just, due, and wholly unpaid. Plaintiff demands judgment for one hundred and fifty dollars, and other proper relief.”

The second paragraph is similar, except as to the names of the pauper, township and trustee.

The objection urged to these paragraphs is that the word “as” before the phrase, “trustee of the township,” has been omitted by the pleader; that such phrase, as it stands, is only a description of the person, and does not show that the trustee acted, in the employment, in his official capacity; and that the same is fatal. In support of this objection, we are referred to *Capp v. Gilman*, 2 Blackf. 45; *White*

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v. *Rankin*, 2 Blackf. 78; *Barnes v. Modisett*, 3 Blackf. 253; *Shepherd v. Evans*, 9 Ind. 260. In the last case referred to, it was held that there was nothing showing any interest of the ward in the note, and the guardian might maintain the action in his individual capacity. We think the complaint in this case sufficiently shows that the services were rendered by appellee, under the employment of the trustees of the townships. And that there was no error in overruling the demurrer to it. *Sheffield School Township v. Andress*, 56 Ind. 157; *School Town of Monticello v. Kendall*, 72 Ind. 91.

Under the second assignment of errors, we have been referred to the fourth alleged cause for a new trial, which reads as follows:

“For error of the court in permitting the plaintiff, over the objection of the defendant, to testify as follows: ‘I employed Dr. Hoyt to assist me, and put the whole fee into one charge.’ ”

There was nothing wrong in the admission of this testimony. The services to be rendered consisted of two surgical operations, in amputating both of the feet of the patient; the condition of the patient’s health required that they should be performed on different days. These operations required skilful assistance, and appellee procured the same, for which he was entitled to pay.

The objections to the introduction in evidence of the poor-books of the townships, on account of the entries therein having been made after the transaction of the matters therein entered, and copied from slips of paper and memorandum books used at the time of the transactions, before the trustees had got regular poor-books, we think were not well taken; they were official acts not under the control of the appellee.

The parol testimony of the trustees, objected to by appellant, we think competent, and properly admitted, to prove

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the actual employment of appellee, to treat the paupers, as alleged; notwithstanding the trustees were also required to keep a record of their official proceedings in a book to be provided for that purpose. 1 R. S. 1876, p. 900, sec. 6.

Our attention is also called to the fifth cause alleged for a new trial, and that is in relation to the instructions to the jury. The following clause in the sixth instruction, given by the court on its motion, is complained of, to wit:

“Where there is evidence on both sides of any issue, that side upon which the evidence is most numerous,” etc., may be said to have the preponderance of the evidence, etc. As an abstract proposition, standing alone, not modified or explained by any subsequent part of the charge, this clause in the instruction would be erroneous, and might mislead the jury. The weight of testimony does not depend upon the number of witnesses or facts sworn to. But immediately following, and as a part of the same sentence, without even a comma between them, we have the following words, “most reasonable, best corroborated by other evidence and by circumstances, and most convincing to the mind and judgment of a reasonable man, may be said to have the preponderance,” etc. Taking the whole instruction together, we do not think that it would tend to mislead the jury.

The ninth and tenth instructions are also complained of. They may be considered together, as they are in all respects alike, except as they are varied to suit the different paragraphs of the complaint. The ninth instruction reads as follows: “If you find from the evidence, that the plaintiff rendered the services charged in the first paragraph of the complaint, or any of them, at the request of the township trustee, and that the person who received the services was a pauper of Jackson township, Jay county, Indiana, and that there was no physician provided by the board of commissioners of Jay county, whose duty it was to render said services, you should find for the plaintiff on the first paragraph

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of the complaint.” The objection urged against these instructions is, that nothing is said about the value of the services. We think this objection is not well taken. The services, when rendered as stated, are presumed to be of some value to the person for whom they were rendered, or inconvenience to the person by whom they were rendered. These instructions were not calculated to mislead the jury in relation to the value of the services.

Objection is also made to the fourteenth instruction, which reads as follows, to wit :

“If you find for the plaintiff, you will ascertain from the evidence of the witnesses, the value of the services by him rendered, and allow him the value of the services for which he is entitled to recover, as ascertained by the evidence of the witnesses who have testified as to the value of such services.”

We see no reasonable objection to this instruction.

The objection to the fifteenth instruction raises the same question that has been heretofore decided upon the introduction of the evidence upon the services of the assistant.

In support of our rulings upon these instructions, we refer to the following authorities : *Brooster v. The State*, 15 Ind. 190 ; *Pennington v. Nave*, 15 Ind. 323 ; *Freeman v. Bowman*, 25 Ind. 236 ; *Dunning v. Driver*, 25 Ind. 269 ; *Hedge v. Sims*, 29 Ind. 574.

We think this case was fairly tried in the court below, and that the verdict of the jury was fully sustained by the evidence, and we see no sufficient reason for reversing the judgment.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things affirmed, at the costs of the appellant.

Love v. Geyer.

No. 9375.

LOVE v. GEYER.

FRAUDULENT CONVEYANCE.—Action to Set Aside.—Grantor and Grantee.—

Judgment.—In an action to set aside an alleged fraudulent conveyance, against the grantor and grantee therein, by a judgment creditor of the grantor, a general verdict was returned against both defendants. On motion, a new trial was awarded the grantor and denied the grantee, and, without judgment, the case was continued. At the subsequent term, the cause as to the grantor was tried by the court, and a finding and judgment rendered in his favor. Over the objection of the grantee, the court rendered a judgment against him, upon the verdict of the jury, setting aside such conveyance as fraudulent.

Held, that such judgment was erroneous.

From the Hendricks Circuit Court.

H. W. Harrington and A. G. Howe, for appellant.

Howk, C. J.—This suit was commenced by the appellee against the appellant, Lewis Love, and Samuel Love and Malinda Love, his wife, as defendants, in the Marion Superior Court. The object of the action was to set aside an alleged fraudulent conveyance of certain real estate, particularly described, in Marion county, Indiana, executed by the said Samuel Love and his wife to the appellant, Lewis Love. The venue of the action, after it had been put at issue, was changed to the court below.

The issues joined were there tried by a jury, and a general verdict was returned for the appellee against all the defendants; and, with their general verdict, the jury also returned into court their special findings as to particular questions of fact, submitted to them by the parties, under the direction of the court. Each of the defendants separately moved the court for a new trial; which motion was granted and a new trial awarded as to the defendants Samuel and Malinda Love, but it was overruled and a new trial was denied as to the appellant, Lewis Love, and to this ruling he excepted. The appellant then moved the court in writing to arrest judgment against him in this cause; which motion

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was overruled, and his exception was saved to this decision. By the agreement of all the parties, the cause was then continued, without the rendition of a judgment, until the next ensuing term of the court; at which time, "at the request of the defendant Samuel Love, the court made a special finding of the facts in the case, and its conclusions of law upon them." The appellant then moved the court in writing for a judgment in his favor, which motion was overruled, and his exception was entered to this ruling. His written objections to the rendition of any judgment against him, in the case, were also overruled, and to this ruling he excepted; and his second motion in arrest of judgment having been overruled, and his exception saved to this decision, the court rendered judgment against him, in favor of the appellee, upon the general verdict of the jury, in accordance with the prayer of the complaint. Upon the court's special finding of facts and its conclusions of law thereon, judgment was rendered against the appellee, and in favor of the defendant Samuel Love, for his costs in this action expended.

In this court, the appellant has assigned, as errors, the several decisions of the trial court adverse to him, as hereinbefore stated. The appellee sued in this action, as a judgment creditor of the defendant Samuel Love, to set aside a certain conveyance of real estate, alleged to have been executed by him and his wife to the appellant, Lewis Love, without any consideration therefor, during the pendency of her action, but before the recovery of her said judgment, against the said Samuel Love, with the fraudulent intent and purpose of cheating, hindering and delaying his creditors generally, and especially the appellee, in the collection of any judgment she might recover of him, in her said action. It will be seen from our statement of this case, that after the jury had returned a general verdict for the appellee, against all the defendants, the court granted the said Samuel Love a new trial. As to him, the cause was then submitted

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to the court for trial, and, at his request, the court made a special finding of facts and of its conclusions of law thereon, upon which he subsequently recovered judgment against the appellee for his costs. In its special finding of facts, the court found, among other things, that the conveyance of said real estate to the appellant "was made by said Samuel Love in good faith, and it was a *bona fide* transaction, on his part, and said consideration was the full value thereof at the time the same was so conveyed;" and further, that, at the date of said conveyance to the appellant, the said Samuel Love was the owner in fee simple of other real estate in the city of Indianapolis, in said Marion county, which he still owned and which was of a value, over and above all encumbrances thereon, largely in excess of the amount of the appellee's judgment against him. Upon these facts, the court's conclusions of law, "that no judgment can be rendered in this cause against defendant Samuel Love, and that judgment should be rendered in his favor against the plaintiff, for his costs expended in this action," were manifestly correct.

After the court had announced and filed its special finding of facts, and its conclusions of law thereon, the appellant's motion for a judgment in his favor, and his written objections to the rendition of any judgment against him, and his second motion in arrest of judgment against him, were each and all overruled by the court, and his exceptions were severally saved to each of these decisions.

We are of the opinion, that the court clearly erred in each of these several rulings, and in the rendition of any judgment against the appellant after it had decided the controlling issues in the cause against the principal defendant, Samuel Love. From the court's special finding of facts, and its conclusions of law thereon, it is clear that the appellee had no cause of action against the defendant Samuel Love; and, without a cause of action against the said Sam-

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uel Love, it is equally clear that she could have none whatever against the appellant, Lewis Love. For in this case it is certain that a valid cause of action against the said Samuel Love, in the appellee's favor, was the only foundation for any claim or cause of action, in her favor, against the appellant, Lewis Love. *Romine v. Romine*, 59 Ind. 346. On this point, see also the case of *Hollingsworth v. Crawford*, 60 Ind. 70.

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to sustain the appellant's second motion in arrest of judgment.

No. 9497.

THE STATE v. PANCAKE.

CRIMINAL LAW.—Gaming.—Pleading.—Indictment.—An indictment, averring that the defendant did “keep his said room and tenement to be used for gaming,” sufficiently charges the offence of keeping a house for gambling, under the first branch of section 29 of the act concerning misdemeanors, 2 R. S. 1876, p. 469; and such indictment is not rendered bad by averring the kind of games played and stating the names of the persons by whom such games were played.

From the Bartholomew Circuit Court.

D. P. Baldwin, Attorney General, *W. C. Duncan*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

ELLIOTT, J.—The State appeals from a judgment entered upon a ruling sustaining a motion to quash an indictment preferred against the appellee by the grand jury of Bartholomew county. The charge against the appellee is thus stated in the indictment: “That the said Frank Pancake, late of said county, on the 20th day of October, 1880, and

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on divers other days between that day and the day of making this presentment, he, the said Frank Pancake, being the tenant and manager of a certain room and tenement in the city of Columbus, Indiana, in said county and State, did then and there unlawfully keep his said room and tenement to be used for gaming, by then and there suffering and permitting one Rudolph Siebert, one Albert Stebbins, one Jerry Williams, one Daniel McCarger and divers other persons, whose names are unknown to the grand jury, to play at certain games of cards called poker, for money and other articles of value."

The indictment is based upon the 29th section of the misdemeanor statute, which contains the following provision: "If any person shall keep, or suffer his or her building, arbor, booth, shed, or tenement, to be used for gaming, * * he shall be fined," etc. This section received a construction by this court in *Sowle v. The State*, 11 Ind. 492, where it was said, WORDEN, J., speaking for the court: "The first branch of the above section contemplates two offences—first, the keeping of a building, etc., for gambling; and, second, suffering gambling in his building, etc." The indictment under consideration in the case in hand charges the offence defined in the first branch of the section under mention, that of keeping a house for gambling. We think the offence is well and sufficiently charged. It is alleged that the appellee did, from the 20th day of October, 1880, and on divers other days between that day and the day of making the presentment, keep his said room and tenement to be used for gaming. This was a distinct and substantive charge, and was sufficient without aid from the averments which followed it.

It is not necessary to aver in an indictment for keeping a house for gambling, that any gambling had actually taken place. In *Sowle v. The State*, *supra*, it was said: "Under the first branch of the section, for keeping a building, etc., for gambling, there need be no averment that gambling had

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actually taken place.” This doctrine is well sustained by the adjudged cases. *The State v. Miller*, 5 Blackf. 502 ; *The State v. Staker*, 3 Ind. 570 ; *Dormer v. The State*, 2 Ind. 308 ; *The State v. Winemiller*, 11 Ind. 516 ; *The State v. Prescott*, 33 N. H. 212 ; *Stoltz v. The People*, 4 Scam. 168.

The time which the house or room was kept for gambling was sufficiently charged. *McAlpin v. The State*, 3 Ind. 567. It would have been sufficient to have shown that the house was kept for gambling purposes for one day. *The State v. Crogan*, 8 Iowa, 523.

The indictment was not rendered bad by the averment of the kind of games played, and the statement of the names of the persons by whom the games were played. It was not necessary to state the character of the games played, or the names of the persons by whom they were played. *The State v. Dole*, 3 Blackf. 294 ; *The State v. Ake*, 9 Tex. 322 ; *Carpenter v. The State*, 14 Ind. 109. The allegation of the character of the games played, and the statement of the names of the persons who played them, are, however, mere matters of surplusage, and do not vitiate the indictment.

The court erred in sustaining the appellee’s motion to quash the indictment.

Judgment reversed, at costs of appellee.

No. 8289.

THE STATE, EX REL. KOLB, *v.* ENNIS ET AL.

JURISDICTION.—Personal Judgment.—A personal judgment is void, if the court have no jurisdiction of the person. •

SAME.—Domestic Judgments.—Presumption.—Where domestic judgments of courts of general jurisdiction are called in question collaterally, jurisdiction of the person will be presumed, in the absence of proof in the record to the contrary.

SAME.—Want of Jurisdiction.—Complaint.—Demurrer.—Answer.—If want
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of jurisdiction be apparent on the face of a complaint, it will be bad on demurrer; but when not apparent it may be shown by answer.

SAME.—How Acquired.—Jurisdiction of the person can be acquired only by service of process, or by appearance, and on appeal it must be affirmatively shown by the record that the process was duly served, or that the defendant appeared.

CROSS COMPLAINT.—Notice.—Notice of a cross complaint must be served on the defendants thereto to give a judgment thereon any validity.

From the Gibson Circuit Court.

C. A. Buskirk and *D. D. Doughty*, for appellant.

J. E. McCullough and *L. C. Embree*, for appellees.

BICKNELL, C.—This was a complaint for review under article 28 of the practice act. The proceeding sought to be reviewed was an action by the appellant against Jacob G. Vail and the appellees, on a sheriff's bond. Jacob G. Vail was the sheriff; his co-defendants were his sureties.

The breach alleged was that the sheriff had three executions, one in favor of The Peoples National Bank against Hargrove, Trippett, Sterne and the plaintiff's relator; another in favor of Welborn, receiver, etc., and against Hargrove and Trippett, and another in favor of Nancy Devin against Hargrove, Trippett and Sterne; that the first and third of these came to the sheriff's hands at the same time, and the second three days afterward; that, in the suit in which said first mentioned execution was issued, the defendants Sterne and the plaintiff's relator appeared and filed an answer in denial, and also filed a cross complaint against their co-defendants Hargrove and Trippett, alleging that, in the contract sued on, said Sterne and the plaintiff's relator were merely sureties for Hargrove and Trippett; that Hargrove and Trippett failed to appear in said suit, and were defaulted as to the complaint, and also as to the cross complaint; that the issues were tried by the court, who found for the plaintiff against all the defendants, and also found for Sterne and the plaintiff's relator on the question of

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suretyship, and rendered judgment in favor of plaintiff against all the defendants, and also rendered judgment that the sheriff, in any execution upon such judgment, should first levy upon and exhaust the property of Hargrove and Trippett before levying upon the property of Sterne and the plaintiff's relator; that upon said first mentioned execution there was a memorandum, signed by the clerk of the court, as follows: "This writ is first to be levied upon the property of Hargrove and Trippett and the same exhausted before a levy be made on the property of Sterne and Kolb;" that the sheriff, on the 21st of August, 1876, levied the second and third of said executions, upon property of Hargrove and Trippett, and afterward realized therefrom, by sale, fourteen hundred dollars, but made no levy of said first mentioned execution, in which Sterne and the plaintiff's relator were sureties, and returned the same unsatisfied on the 8th of June, 1877; that the sheriff was never directed by the plaintiff in said first mentioned execution not to levy the same, and that he held the same in his hands without levying "until said property of Hargrove and Trippett was wasted and wholly lost to the plaintiff in said execution;" that, after said first mentioned execution was returned unsatisfied, an *alias* execution was issued, with like memorandum thereon, signed by the clerk, as was upon said first mentioned execution, and that said sheriff, pretending that all the property of said Hargrove and Trippett had been exhausted, demanded of said plaintiff's relator payment of said *alias* execution, and threatened to levy the same upon his property; that, in order to prevent such levy, the plaintiff's relator was compelled to pay to said sheriff eleven hundred dollars, whereby an action has accrued, etc. The action on the sheriff's bond was tried by the court upon the complaint assigning the foregoing breach, the general denial, a third paragraph of answer, and the plaintiff's reply thereto in denial. The third paragraph of the answer alleged, in sub-

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stance, that the court had no jurisdiction to determine the question of suretyship, because, although there was a cross complaint filed by Sterne and the plaintiff's relator, against Hargrove and Trippett, alleging suretyship, yet there was no summons issued upon said cross complaint, and that Hargrove and Trippett did not appear to said cross complaint, and did not appear in the original action, but were defaulted therein, and were not, nor was either of them, present in court when said cross complaint was filed, or when said judgment of suretyship was rendered. Upon the foregoing issues the court found for the defendants. A motion for a new trial was overruled, and judgment was rendered for defendants.

The proceedings in the suit upon the bond are set forth in the complaint for review, and a bill of exceptions presents all the evidence.

The court below sustained a demurrer to the complaint for review, and rendered judgment against the appellant.

The only error assigned here is that the court below erred in sustaining said demurrer. The plaintiff's relator being one of the defendants in the suit in which the execution of the Peoples National Bank was issued, the alleged misconduct of the sheriff worked no injury to him, unless he had been properly adjudged to be a surety, as alleged in his original complaint.

A personal judgment is void if the court have no jurisdiction of the person. *Mitchell's Adm'r v. Gray*, 18 Ind. 123.

In case of domestic judgments of courts of general jurisdiction, collaterally in question, jurisdiction of the person will be presumed, where the record discloses nothing on the point, in the absence of proof to the contrary. *Waltz v. Borroway*, 25 Ind. 380.

If want of jurisdiction be apparent on the face of a complaint, the complaint will be bad upon demurrer. Practice act, sec. 50.

Want of jurisdiction not apparent on the face of the com-

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plaint may be shown by answer. *Brownfield v. Weicht*, 9 Ind. 394.

Jurisdiction of the person can be acquired only by service of process, or by appearance, and on appeal it must be affirmatively shown by the record, that the process was duly served, or that the defendant appeared. *Hawkins v. Hawkins' Adm'r*, 28 Ind. 66.

In the action on the bond, the evidence fully sustained the averments of the third paragraph of the answer.

The court therefore had no jurisdiction to inquire into the question of suretyship between the plaintiff's relator and Hargrove and Trippett, and no jurisdiction to render any judgment on that subject. This question was fully considered by this court in *Joyce v. Whitney*, 57 Ind. 550, where it was held that a judgment so obtained, without notice to the defendants of the cross complaint, was of no validity for any purpose whatever.

The finding and judgment for defendants in the proceeding sought to be reviewed were right; the demurrer to the complaint for review was rightly sustained. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellant.

No. 9398.

RODIFER v. THE STATE.

CRIMINAL LAW.—Renting Property for Gaming Purposes.—Evidence.—To sustain a prosecution, under section 29 of the act defining misdemeanors, etc., 2 R. S. 1876, p. 469, the State must show, by sufficient evidence, either direct or circumstantial, that the accused rented the property to be used for the purpose of gaming.

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From the Boone Circuit Court.

C. S. Wesner, for appellant.

D. P. Baldwin, Attorney General, and *W. R. Moore*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The appellant was tried and convicted upon an indictment charging him with having rented a house “to be used for gaming.” There is a single question discussed, and that is: Was the verdict sustained by the evidence?

The indictment is based upon the 29th section of the misdemeanor statute, which provides, among other things, that it shall be an offence for any person “being the owner of any building, arbor, booth, shed or tenement,” to “rent the same to be used for gaming.” To sustain a prosecution under this statute, the State must show that the accused rented the property for the purpose of gaming. We do not mean, of course, that there must be direct evidence showing the purpose for which the property was rented, but there must be sufficient evidence, either direct or circumstantial, of this essential element of the offence, or no prosecution can be maintained. In the present case, there was an entire absence of evidence upon this material point. So far from its having been proved by the State that the premises were rented for use for gaming, it was proved that the appellant expressly prohibited their use for that purpose, and exacted from his tenant an agreement that they should not be so used. The evidence shows that the premises were rented for lodging rooms, and for no other purpose.

It is true that the evidence shows that gambling did actually take place on the premises, but this is very far from proving that the accused rented them for any such purpose. It is also true that the appellant was informed that there was probably some gambling in the rooms, but it is equally true that, immediately upon receipt of this information, the appellant went to his tenant, reminded him of his contract,

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notified him that he must not permit any gambling, and that, if he did, he would be at once ejected.

We reverse the judgment below, not because of a conflict in the evidence, but because there is an entire failure of proof upon one of the most material points in the case.

Judgment reversed.

No. 9112.

THE STATE v. HENDERSON.

CRIMINAL LAW.—*Prosecution by Affidavit and Information.*—In a prosecution by affidavit and information, the affidavit must state that the defendant is in custody on the charge preferred against him, and that the grand jury of the county is not in session.

From the Orange Circuit Court.

D. P. Baldwin, Attorney General, *M. S. Mavity*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

ELLIOTT, J.—This appeal is prosecuted by the State, and calls in question the correctness of the ruling of the court below in sustaining appellee's motion to quash.

The affidavit was insufficient, for the reason that it did not state that the appellee was in custody on the charge preferred against him, and that the grand jury of the county was not in session. These were jurisdictional facts, and the affidavit, which was the basis of the prosecution, was fatally defective in omitting to aver the facts which authorized the court to assume and exercise jurisdiction. *Burroughs v. The State*, 72 Ind. 334; *Lindsey v. The State*, 72 Ind. 39; *Davis v. The State*, 69 Ind. 130.

Judgment affirmed.

Zehner et al. v. Aultman et al.

No. 7724.

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PRACTICE.—Instruction.—Record.—Supreme Court.—Where an instruction complained of is set out in the motion for a new trial, but does not otherwise appear in the record, no question with reference thereto is properly presented to the Supreme Court.

CHATTEL MORTGAGE.—Description.—Property described in a chattel mortgage as “one-third of twenty-two acres of growing wheat, situate,” etc., means the undivided one-third of such wheat, and is a sufficiently particular description.

SAME.—Demand.—Where a chattel mortgage is duly recorded, no demand for the mortgaged property of a purchaser thereof is necessary before suit to foreclose the same.

From the Marshall Circuit Court.

P. O. Jones and *A. C. Capron*, for appellants.

W. B. Hess, for appellees.

WOODS, J.—Suit upon a promissory note and chattel mortgage. Issues of fact; verdict, judgment and decree of foreclosure in favor of the appellees. The appellant Zehner was not a party to the note or mortgage, but was charged as a purchaser in possession of a part of the mortgaged property, which, besides a reaper and mower, was described in the mortgage as consisting of “one-third of twenty-two acres of growing wheat, situate,” etc.

Zehner alone has assigned error, and that upon the overruling of his motion for a new trial. Under this assignment he claims that the verdict against him is contrary to law, and not supported by sufficient evidence, and that the court erred in giving an instruction to the jury.

An alleged copy of the instruction complained of is given in the motion for a new trial, but it does not otherwise appear in the record. There is, therefore, no question properly saved in reference to it. *Elbert v. Hoby*, 73 Ind. 111; *McDaniel v. Mattingly*, 72 Ind. 349.

It is claimed that the particular part of the wheat intended to have been mortgaged is not specified, and that the mort-

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gage is therefore void in respect to the wheat. The court interpreted the mortgage as meaning the undivided one-third of the wheat. This was right, and a more particular description was not necessary.

The point is made that there was no proof of demand upon Zehner for the wheat before suing. The mortgage was duly recorded, and he therefore bought the mortgaged wheat with notice, either actual or constructive, of the plaintiffs' claim, and no demand was necessary upon him any more than upon the maker of the mortgage. But, if it were required, there was sufficient proof on the subject. Upon a demand made of him, at Plymouth, the appellant refused to surrender the wheat, and declared a purpose to shoot any one who should come for it. Under the circumstances he can hardly be heard to complain that a demand was not made upon his premises.

There is no particular in which we find a lack of evidence in the record sufficient to support the verdict.

The judgment is therefore affirmed, with costs.

No. 7989.

WILLIAMS v. MORAY ET AL.

NEGLIGENCE.—Keeping Vicious Animal.—Damages.—Pleading.—Complaint.—The owner or keeper of a vicious dog, knowing it to be such, is liable *prima facie* in an action for damages, to a person injured thereby; but he is not liable if the negligence of the party injured contributed to the injury, and the complaint in such action should aver that the plaintiff was without fault.

From the Johnson Circuit Court.

S. P. Oyler, for appellant.

F. S. Staff and *P. M. Dill*, for appellees.

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BEST, C.—The appellee John Moray brought this suit against his co-appellee, and the appellant. His complaint consisted of two paragraphs. He averred, in substance, in the first, that said James and Thomas Williams wrongfully kept a certain dog, well knowing that said dog was accustomed to attack and bite mankind; that, while they so kept him, said dog did attack and bite the plaintiff, by reason whereof he was greatly injured and damaged, in the sum of five hundred dollars.

In the second, he, in substance, averred that said James and Thomas Williams did wrongfully keep, unsecured, a certain ferocious and mischievous dog, and suffered the same to run at large, well knowing said dog's ferocious and mischievous nature, and his propensity to attack and bite mankind; that, while said dog was suffered by them to run about, without restraint or confinement, he did, on the street and sidewalk, in the city of Franklin, attack and bite the plaintiff, throwing him down, tearing his clothing, wounding and lacerating one of his legs, with great violence, by reason of which the plaintiff was greatly injured, and sustained damages in the sum of five hundred dollars.

The appellant demurred to each paragraph of the complaint, because neither stated facts sufficient to constitute a cause of action. The demurrer was overruled, and he excepted. Both defendants filed an answer in denial. The issue was submitted to a jury, and a verdict returned for the appellee against the appellant, and in favor of the appellee Thomas Williams. The appellant moved for a new trial, which was overruled, and he excepted. A judgment was rendered against him upon the verdict, from which he appeals and assigns, as error, that the court erred in overruling his demurrer to each paragraph of the complaint, and in overruling his motion for a new trial.

In support of the first assignment, it is insisted that the facts averred do not show, nor is there any averment in the

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complaint, that the appellee was himself without fault, and, therefore, each paragraph was insufficient on demurrer.

In all actions of negligence this is the rule of pleading. It was so held in the case of *The President, etc., v. Dusou-chett*, 2 Ind. 586, and the ruling in that case has been uniformly followed since. *The Evansville, etc., R. R. Co. v. Hiatt*, 17 Ind. 102; *The Indianapolis, etc., R. R. Co. v. Keeley's Adm'r*, 23 Ind. 133; *The Evansville, etc., R. R. Co. v. Dexter*, 24 Ind. 411; *The Jeffersonville R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228; *Louisville, etc., R. W. Co. v. Boland*, 53 Ind. 398.

In the case last cited, it is said, that in this State it is established by a long line of decisions, that, in an action to recover for an injury caused by the negligence of another, the complaint must show that the party injured was himself guilty of no negligence that contributed to the injury. This is, then, the settled rule in all cases to which it applies. Does it apply in this case? It does, if the action is based upon the negligence of the appellant.

In *Shearman and Redfield on Negligence*, it is said :

“Sec. 185. The owner of an animal is liable for injuries which by his negligence he suffers it to commit ; and, except in some cases provided for by statute (which will be hereafter separately considered), he is not liable for the acts of the animal upon any other ground than that of negligence, actual or presumed.”

The common law imposes the duty upon the owner of an animal that is naturally inclined to stray and trespass upon the lands of another, to restrain it, and, if he does not, negligence is presumed. This duty is not imposed upon the owner of a dog, for the reason that the straying of such an animal upon the lands of another is not liable to cause an injury, but a like duty is imposed upon the owner of a dog to restrain him, if the owner have knowledge that he is vicious, and, if he is not restrained, the failure so to do is negligence.

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The gist of the action is the failure to keep such animal securely. It is frequently said that the *scienter* is the gist of the action, and it is true that no action can be maintained without it, but it is equally true that no action can be maintained with it alone. No law is violated, nor any liability created by securely keeping a ferocious animal, with knowledge of its vicious disposition, but this knowledge imposes the duty to keep it safely, and the neglect to do this, coupled with an injury, creates the liability. No negligence is imputed without this knowledge, and with it no liability is incurred, without negligence.

If the owner of such animal, after notice of its vicious disposition, neglects to keep it securely, and any person is injured by it, he is *prima facie* liable for the injury, without proof of neglect in keeping such animal. He must keep it safely, or respond in damages for all injuries inflicted by it, without the fault of the person injured.

This court said, in *Partlow v. Haggarty*, 35 Ind. 178, that “Whoever keeps an animal accustomed to attack or bite mankind, with knowledge of its dangerous propensities, is *prima facie* liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or fault in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous disposition. Addison on Torts, 184. It was the duty of the defendant to see to it that so dangerous an animal was left in safe hands.”

The neglect of the owner renders him *prima facie* liable to every person who is injured by such animal, after notice of its vicious disposition. It does not, however, render him absolutely liable. His negligence will not render him liable, if the negligence of the injured party contributed to the injury.

Judge Cooley, in his work on Torts, at page 346, says: “The doctrine of contributory negligence applies to the case

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of injury by animals." The same is asserted in section 199 of Shearman and Redfield on Negligence, and has been recognized as a rule of law, applicable to all the cases brought to recover for such injuries. *Smith v. Pelah*, 2 Strange, 1264; *Woolf v. Chalker*, 31 Conn. 121; *Blackman v. Simmons*, 3 C. & P. 138; *Loomis v. Terry*, 17 Wend. 496; *Munn v. Reed*, 4 Allen, 431.

As the gravamen of the action is negligence, and as contributory negligence by the injured party will preclude a recovery, the complaint should aver that the plaintiff was without fault. It is true that each paragraph of this complaint is in accordance with the forms in Chitty, Abbott, etc., but these forms are in actions of negligence, and can not be regarded as sufficient in this State, under the rule established in 2 Ind., *supra*.

For these reasons we are of opinion that the same rule applies to this case, and that the court erred in overruling appellant's demurrer to each paragraph of the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and is hereby, in all things reversed, at the costs of the appellee John Moray, with instructions to sustain the demurrer, with leave to amend.

No. 7648.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD CO. v.
SCOTT ET AL.

STREETS. — *Title of Adjoining Proprietor. — Town Laid out by State. —*

Indianapolis.—The State, in laying out for its seat of government, upon land donated by the United States for that purpose, the town of Indianapolis, and making and filing maps thereof, as required by law, vested in the town, for the use of the public, such rights to the streets and alleys, and such interest therein, as would have been vested in it if any citizen had been the proprietor of the land and had laid out the

74	29
125	477

74	29
139	301

74	29
148	369
148	370

74	29
155	25
156	92

74	29
1169	577
1169	578

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town in the same way; and the grantee in fee simple, in a conveyance by the State through its agent, of a lot by its number, abutting upon a public street in said town, and his assignees, acquired such rights to said street and such interest therein as would be conferred by a like conveyance made by such a citizen proprietor of a town; that is, such grantee and his assignees took the fee, subject to the public use, to the center line of such adjoining street.

SAME. — Railroad. — Appropriation of Land. — Construction of Charter.—

Where the charter of a railroad company provides that, in all cases where the owner of lands necessary for the use and construction of its road "shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor," it shall be lawful for the corporation to enter and take possession of and use such lands, and that the owner of lands, who feels aggrieved or injured by such use thereof, shall make application to a justice of the peace for an appraisal of damages, and that there shall be no recovery by such owner unless such an application be made by him within two years, such provisions will be strictly construed as against the owner of land taken, and such limitation will not apply as against the owner of a lot abutting upon a public street of a city, incorporated under the general law for the incorporation of cities, upon his side of which street such railroad company has maintained its track for fifteen years, upon a level with the grade of the street, with the authority of such city, but without the consent of the owner of such lot, without having demanded of him a relinquishment of his title to the street, and without having offered him a fair compensation; and, against the railroad company so occupying the street, such adjoining proprietor may have the usual remedies for the protection of rights in real property.

From the Marion Superior Court.

C. Baker, O. B. Hord and T. A. Hendricks, for appellant.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellees.

MORRIS, C.—The appellees, who were the plaintiffs below, in their complaint say, that for fifteen years last past they have been and still are the owners of lots 7, 8, 9, 10, 11 and 12 in square 92, in the city of Indianapolis; that said lots are contiguous to, and, on the south-east side thereof, for the distance of 600 feet, abut upon, Kentucky avenue, a public street in said city, and that, as the owners of said

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lots, they are also the owners in fee, and have been during said fifteen years, of that portion of said street, for said distance, lying between their said lots and the center line of said street; that ingress and egress to and from said lots, during said period, have been obstructed and prevented on the north side thereof by eight railroad tracks, constructed and in constant use near thereto; that the plaintiffs have, during said time, used said lots for the purpose of storing thereon rough, hewn and dressed stone, and as a place for sawing, cutting and dressing stone for building purposes; that, in prosecuting their business, it is necessary that they should have free and uninterrupted access to their said lots, with horses and wagons.

They further say, that on the —— day of ———, 187—, the White River Iron Company, a corporation organized under the laws of the State of Indiana, without right, and without first causing damages to be assessed and tendered to the plaintiffs, and without their consent, entered upon, and laid a railroad track upon, that portion of said Kentucky avenue described as belonging to them. They further say, that the White River Iron Company was succeeded by the Capital City Iron Company; that the appellant, the railroad company, a corporation organized under the laws of the State of Indiana, procured an assignment and transfer to it, from said Capital City Iron Company, of said railroad track; that said appellant still maintains said railroad track, and still uses the same, and has for fifteen years used the same for the passage of locomotives and cars; that the occupancy of said street by the defendants and each of them, for railroad purposes, has always been without the consent of the plaintiffs.

The plaintiffs say they have been damaged by the unlawful use of said street by the appellant, in the sum of \$20,000. They ask an injunction, and all other proper relief.

The appellant demurred to the complaint. The demurrer was overruled, and it excepted.

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The appellant then answered the complaint in five paragraphs, the first being a general denial.

The second paragraph of the answer admits that the appellees are the owners of the lots as alleged, but avers that the lots are, and have been, within the limits of the town and city of Indianapolis ever since the 5th day of February, 1836; that, prior thereto, said lots were a part of the territory selected and laid off as a town, and site for the permanent seat of government for the State, under an act for the appointment of commissioners to select and locate the seat of government for the State, approved January 11th, 1820, an act appointing commissioners to lay off a town on the site selected, approved January 6th, 1821, and an act authorizing the agent of the State to lay off the lands belonging to the State into lots, and offer the same for sale, approved February 9th, 1831; that said commissioners laid out the town, made two copies of its plans, locating and marking thereon Kentucky avenue, and the lines, form and dimensions of said lots as the same were when the appellees purchased them; that Kentucky avenue was marked and designated on said plan as a street of said town; that two plans of the town were duly made, certified and disposed of as the law required, one being deposited with the Secretary of State, and the other with the agent of State for said town; that, under the act of February 9th, 1831, the agent of State of the town of Indianapolis made two complete maps of the town, designating the names and width of the streets and alleys, and the number and size of the several squares thereon, the number and size of in-lots and out-lots, and the forms, courses and distances of their boundaries, the contents and numbers of the several lots, which maps were disposed of by the agent as provided by law; that, in all respects, these maps were made, filed, endorsed, etc., as required by law; that, upon said maps, the width and courses of Kentucky avenue, Louisiana street and West street were

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marked and designated ; that the real estate described in the complaint was sold and conveyed by the agent of State of said town to one Dennis White, on the 12th day of December, 1835 ; that the title of plaintiffs to said lots is derived from the State, through the conveyance to said White ; that the plaintiffs obtained title to lots 7, 8, 9 and 10 on the 6th day of August, 1860 ; to the two-thirds of lot 12 on the 6th day of August, 1860, and to the other one-third on the 22d day of January, 1864 ; to the two-thirds of lot 11, August, 1860, and to the other third ———.

It is then averred that on the 25th day of February, 1867, the common council of Indianapolis passed an ordinance, which has ever since been in force, authorizing the Indianapolis Furnace Company to lay a railroad track on said Kentucky avenue, which was subsequently amended so as to give the same privileges to its assignee ; that this company constructed the railroad track complained of, and that appellant, as its successor and assignee, became the owner of said track on the 28th day of November, 1873, and has since remained such owner.

It is then averred that the appellant is a railroad company, organized under certain acts of the State of Indiana, to wit : An act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26th, 1847 ; an act amendatory thereof, approved February 16th, 1848, and an act further amendatory thereof, approved January 13th, 1849. That the appellant accepted the act of January 13th, 1849, on the 12th day of February, 1849. It is further averred that on the 28th day of February, 1873, the appellant acquired, by assignment from the Capital City Rolling Mill Company, the successor and assignee of the Indianapolis Furnace Company, all the rights of the latter company, under said ordinance, to said railroad track, and then appropriated to its own use the ground upon which said track was built, and ever since has

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held, occupied and used the same, subject to the rights of the public, for a railroad track, etc.

The third paragraph of the answer admits the plaintiffs' ownership of said lots, and the north half of Kentucky avenue, as stated in the complaint; but it avers that the appellant is a corporation, existing under the laws of the State; that said track was laid, and has been maintained, level and even with the grade of said avenue; that said avenue is a public street in the city of Indianapolis, a municipal corporation, existing under the general laws of the State, during the time mentioned in the complaint; that the plaintiffs' estate in said street, and during all said time has been, subject in all things to the right of use thereof as a public highway and street of the city for all the uses of a street; that said track was laid, and has been maintained, by the appellant as a part of its main line of railroad from Indianapolis to Terre Haute, for the transportation of freight and passengers by the appellant as a common carrier, without in any manner obstructing said avenue, or in any way inconsistent with the proper use of said track for transportation by means of cars drawn by steam engines, etc.

The fourth paragraph states that the lots mentioned in the complaint were part of a tract of land donated by the United States to the State of Indiana as a permanent seat of government; that it was properly selected and established by the State as the permanent seat of government; that it was, by the proper agents of the State, duly, and in accordance with law, laid out as a town into squares, lots, public streets and alleys, of which square 92 was one, and that said Kentucky avenue was one street, dividing said square; that two complete maps were made by the proper officers of said town and disposed of as the law required; that the north-west half of said square 92 was sold and conveyed by the agents of the State to Dennis White, on the 12th day of December, 1835, by and according to the description of said maps, as

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follows: "North-west half of square 92, in the town of Indianapolis;" that the only right and title of said plaintiffs to said Kentucky avenue was derived and held by sale and conveyance to their grantor by said description, and not otherwise; that said avenue was, during all said time in the complaint mentioned, a public street of the city of Indianapolis, a city incorporated under the general laws of the State for the incorporation of cities; that said railroad track is on a level with the grade of said avenue, and used for the transportation of freight, etc.

The fifth paragraph of the answer is like the fourth, except that it avers specially, as in the second paragraph of answer, the manner in which the appellant was organized, and that the railroad track was laid on said Kentucky avenue in such manner as not to obstruct the same; that said lots and avenue in complaint mentioned have been at all times within and part of the city of Indianapolis, a city existing under the general laws of the State; that said lots being the private property of the appellees and their grantors, and the said avenue a public street of said city, laid out, graded, etc., by said city, the plaintiffs had, at no time, any right, title or interest in said avenue other than as grantees of said lots in the complaint mentioned, by derivation thereof from said Dennis White; that said city, by the general laws of the State, had and exercised exclusive control over the streets of said city, of which said avenue was one, and that before said railroad track was laid, said city granted to the Indianapolis Furnace Company, assignor and predecessor of appellant, a license to construct and maintain said railroad track, as the same was and had been laid and maintained on said avenue by ordinances properly passed by the common council of said city, in February, 1867; that said ordinances have been continuously in force, etc.

The appellees demurred to the second, third, fourth and

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fifth paragraphs of the answer. The demurrers were sustained and the appellant excepted.

The cause was submitted at special term to the court for trial. Findings and judgment for appellees. The appellant moved for a new trial, which motion was overruled and it excepted. The appellant appealed to the general term of said court. The judgment at special term was affirmed, and the appellant excepted.

The errors assigned by the appellant, on appeal from the special to the general term, are :

First. That the court at special term erred in overruling the appellant's demurrer to the appellees' complaint ;

Second. That the court erred in sustaining the appellees' demurrer to the 2d, 3d, 4th and 5th paragraphs of the appellant's answer.

Third. The court erred in overruling the appellant's motion for a new trial.

The error assigned in this court is, that the court at general term erred in affirming the finding and judgment at special term. The evidence is set out in a bill of exceptions. It is not insisted by the appellant, that the evidence introduced by the appellees did not sustain their complaint, nor does the appellant ask that the judgment below should be reversed on the ground that the evidence was not sufficient to support the finding of the court. The appellant in the court below, at the proper time, offered to prove the facts alleged in the 2d, 3d, 4th and 5th paragraphs of its answer. The appellees objected, not to the form of the offer thus made, but on the ground that the facts, if proven, would constitute no answer or defence to the complaint. The court sustained the objection, refused to hear the offered proof, and the appellant excepted.

Counsel for the appellant neither waive nor press objections to the complaint. We think it states a cause of action, and that there was no error in overruling the demurrer to it.

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The evidence established the facts stated in the complaint. If the demurrer to the 2d, 3d, 4th and 5th paragraphs of the answer were rightly sustained, there was no error in overruling the appellant's motion for a new trial. If these paragraphs were bad, there could be no error in ruling out testimony offered in proof of them. If the paragraphs were good, it was error to sustain the demurrers. We need not, therefore, separately consider the motion for a new trial. The questions arising upon the motion will be considered in disposing of the demurrers.

The first question discussed by counsel for the appellant is : Does the purchaser of a lot by its number, abutting upon a public street in a city duly laid out and incorporated, the location and width of its streets and alleys, and the number and size of its squares and lots having been properly marked and designated on plats and maps made and filed in strict accordance with the statutes of the State made for that purpose, take, as a part of or as incident to his purchase, the fee, subject to the public use, to the center line of the adjoining public street?

The appellant insists that the purchaser does not so take, but that the fee in the streets is in the city, and held by it in trust for the public use.

The lots described in the complaint were a part of a tract of land donated by the United States to the State, as a site for a permanent seat of government for the State. The town of Indianapolis was laid out by the State as its permanent seat of government, and included within its limits said lots and the street in dispute. The lots abutting upon Kentucky avenue were sold and conveyed by the State, through its proper agents, to one White, from whom the appellees derive title. In laying out the town of Indianapolis, making and filing maps as required by law, the State vested in the town for the use of the public such rights to, and interest in, the streets and alleys of the town as would have vested

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in it had any citizen been the proprietor and laid out the town in the same way. And the deed to White gave him just such rights to, and interest in, the streets upon which the lots conveyed abutted, as would a like deed made by any other party who might have been the proprietor of the town.

It is insisted by the appellant, in an exhaustive argument, that the making and filing of maps of the town, as required by law, operated as a grant of the fee in the streets to the town, in trust for the public use. It is claimed that the language of the second section of the act of 1818 can not be reconciled with any other view; that the words "general warranty," as used in that section, are without meaning as to the donation of streets unless construed as indicating the quantity of the interest granted; that, as to streets, the words are meaningless and purposeless, unless they can have this operation. There is much plausibility and force in this reasoning, but we must regard the question as settled the other way in Indiana.

The case of *Cox v. The Louisville, etc., R. R. Co.*, 48 Ind. 178, is precisely in point. The decision was made upon great deliberation, after hearing arguments in a number of cases involving the same point, and the conclusion reached was, that the towns and cities of Indiana, laid out in accordance with the statutes of the State upon the subject, take but an easement in the public streets, and that the fee in the streets remains in the proprietor and his grantees of the lots abutting upon such streets. This case has been approved by this court in a number of subsequent cases: *Sharpe v. The St. Louis, etc., R. W. Co.*, 49 Ind. 296; *Ross v. Faust*, 54 Ind. 471; *Nelson v. Fleming*, 56 Ind. 310; *The Anderson, etc., R. R. Co. v. Kernodle*, 54 Ind. 314; *Roelker v. The St. Louis, etc., R. W. Co.*, 50 Ind. 127. And these cases agree with the early case of *Conner v. The President, etc.*, 1 Blackf. 43.

It is said that in the case of *Cox v. The Louisville, etc., R. R. Co.*, *supra*, the complaint alleged that the plaintiff

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owned the street in fee; that the demurrer admitted this, and therefore the real question was not involved, though decided by the court. But clearly the court and counsel engaged in the case regarded the complaint as alleging ownership of the street merely by way of conclusion from the alleged ownership of the lot; and in this we think the court was right. While Cox does aver that he owned the street, etc., he does it in such a way as to show that the averment is simply an inference deduced from his ownership of the lot. So the pleading was understood by all, and the decision should have the same force as if there could be no question as to this.

It is further said that it was not averred in the complaint that maps of the city of Lafayette had been made and disposed of as required by law. This may be, but in deciding the case the court assumed that the law in this respect had been fully complied with. Judge DOWNEY says: "Conceding that the proprietor of the town complied with this law in every respect, that he made the plat and caused it to be recorded, indicating the location of the street and its width, and writing upon it its name or number, what was the effect or operation upon his ownership of the fee simple estate which he had in the land over which the street runs? It is not very clear that the second section of the statute has any reference to streets, lanes, and alleys, but we will concede that it has, and that streets, lanes, and alleys are among the 'donations or grants' mentioned in the section." Streets thus considered, the court say, belong to the owners of abutting lots, subject to the public easement. We approve the conclusion reached in this case.

It is alleged in several paragraphs of the answer, that the appellant took possession of the railroad track mentioned in the complaint fifteen years ago, and that portion of Kentucky avenue occupied by said track, and has used it continuously ever since as a part of its main line of railroad,

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for the transportation of freight and passengers thereon, pursuant to the provisions of its charter. It is stated that the appellant was incorporated under an act, approved January 26th, 1847, Local Laws of 1847, p. 77, the fifteenth section of which, it affirms, was repealed by the third section of the act of January 13th, 1849, which was duly accepted by it. It is insisted that the third section of the act of 1849 not only repealed the fifteenth section of the act of 1847, but that it authorized the appellant, without notice to the land-owner or an offer to purchase the right of way through his lands, to enter upon and take possession of any land required for its right of way, or the construction of its road, and that unless the owner within two years from such entry made application in writing before some justice of the peace of the proper county, for compensation as provided in said section, it became seized of the land so taken in fee, and he waived all right to compensation.

The 18th section of the act of 1847, incorporating the appellant, provided that, when the corporation had procured its right of way as therein provided, it should be seized of the land so procured in fee. The 3d section of the act of January 13th, 1849, provides that, "In all cases where the owner or owners of lands, stone, [gravel, wood, or other materials,] necessary for the use and construction of said road, shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor, it shall be lawful for the corporation, by their president, or by any superintendent, agent or engineer employed by them, to enter upon, and take possession and use the same, avoiding in all cases unnecessary damage or injury to the owners or proprietors; and where the said owner or owners may feel aggrieved or injured in consequence of such use of land, or stone, [or other materials,] the person or persons so feeling aggrieved or injured, shall make written complaint before the nearest justice of the peace within the county where such

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supposed injury has been done, particularly setting forth the nature and locality of the injury, and the interests of the complainant or complainants therein. Whereupon such justices of the peace shall require the president of said company to appoint one disinterested appraiser, who shall be a citizen of the county in which such justice has jurisdiction, and who shall not be a stockholder in said company, within thirty days from the date of such requisition of the justice, and notify such justice of the name and place of residence of such appraiser; such justice of the peace shall also require the complainant or complainants to appoint one disinterested appraiser, who shall be a citizen of the county, and shall not own land within three miles of the line of said road, and such justice shall thereupon summon the appraisers so appointed to meet on a certain day and select a third disinterested appraiser, who shall also be a citizen of that county, and shall neither own stock in said corporation nor land within three miles of the line of said road, and the three appraisers so appointed, after being duly sworn by said justice to do impartial justice between the complainant or complainants and the corporation, and to take into consideration the benefits resulting to the complainant or complainants by the construction of the road, according to the best of their judgment, shall upon actual trial and computation [view] of the supposed damages, make up their award, and report the same to such justice, who shall thereupon record the same, together with all costs, and enter his judgment and enforce its collection, in the same manner that other judgments are collected: *Provided*, that the complainant or complainants shall be liable to pay all costs, unless the award of the appraisers exceeds in amount the sum previously offered by the agents of the corporation as a compensation for the supposed injury; the decision and award of the appraisers, so made, shall be final between the parties, unless either party shall appeal," etc.

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It then provides that the proceedings on appeal shall be conducted as in other cases of appeal; and then follows this proviso: "*Provided*, That no claim shall be recovered or paid by said corporation, unless the application therefor be made as herein provided, within two years next after the property shall have been taken possession of as aforesaid." Section 4 of this act provides, that so much of sections 13, 15 and 16 of the act of January 26th, 1847, incorporating the appellant, as conflicts with section 3 of the act of January 13th, 1849, shall be repealed.

We think that section 3, above recited, repeals section 15 of the act of January 26th, 1847. It covers the whole subject embraced by the latter section, and is inconsistent with all its provisions, except so much of it as relates to the refusal of the land-owner to relinquish to the corporation the land required, or to accept compensation therefor, but this portion of it is, in almost the same words, contained in section 3 of the act of 1849. So much of section 16 of the act of 1847 as provides for notice to infants, insane persons, etc., may not be repealed, nor is section 14, which provides for agreements to purchase the right of way, materials, etc.

It is claimed by the appellant, that, under section 3 of the act of 1849, it had the right to enter upon and take possession of Kentucky avenue and use and occupy the same, lay its track upon it and run its cars and locomotives over it, without the consent of the appellees, though they had not refused, nor had an opportunity to refuse, to relinquish their right in the street to the appellant, nor refused to accept fair compensation for said street.

The question is not whether the Legislature could have authorized the appellant thus to take and appropriate the appellees' property, but whether by this section such authority has been given to the appellant.

That this act, which ripens the possession of the appellant, taken without consulting the owners, and, it may be, with-

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out their knowledge, into a title in fee in two years, should be strictly construed, will hardly be questioned.

The appellant can only exercise this unusual and extraordinary power in cases where the law expressly confers it. The language of the section seems to be clear: "In all cases where the owner or owners of lands," etc., shall refuse to relinquish to the corporation, or shall refuse to accept a fair compensation "therefor, it shall be lawful for the corporation, by their president," etc., "to enter upon and take possession," etc., is the language of the section. The cases in which the corporation may enter upon and take possession of the land of another are clearly specified. The provisions of the section, though unusual and extraordinary, if limited to the cases specified, will neither be unusually harsh nor palpably unjust. If, under the power conferred, the corporation can only take possession of land which the owner has refused to relinquish, or for which he has refused to accept fair compensation, he can not, without negligence on his part, lose his rights. In such cases, he could hardly fail to obtain notice of the entry and possession of the corporation.

It can not be inferred, legally or logically, that because the law authorized the appellant to take possession of so much of another's land as might be necessary for the way of its road, on the ground that he had refused to accept fair compensation for it, it is authorized to take the land of others who have not refused, nor had an opportunity to refuse, such compensation.

It will not be pretended that, in the absence of statutory authority, the appellant could enter upon and take possession of the land of another without his consent. Section 3 of the act of 1849, which confers all the power the appellant has in this respect, says that upon the refusal of the owner to accept fair compensation, etc., it may enter. In no other case does the law authorize such an entry. No such authority can or should be implied. Mills Eminent Domain, sec. 105 ;

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1 Redfield Railways, 232; *Eward v. The Lawrenceburgh, etc., R. R. Co.*, 7 Ind. 711; *Vail v. The Morris, etc., R. R. Co.*, 1 Zab. 189; *Doughty v. The Somerville, etc., R. R. Co.*, 1 Zab. 442; *The Mississippi, etc., R. R. Co. v. Rosseau*, 8 Iowa, 373; *Dyckman v. The Mayor, etc.*, 5 N. Y. 434.

In the case of *Bonaparte v. The Camden, etc., R. R. Co.*, Bald. 205, the question was whether the company had the right to enter and take possession of the complainant's land, without filing a survey of its road as required by its charter. The company claimed that it had the right, but the court held otherwise—that the filing of the survey was a condition precedent to the right of entry.

In the case of *The Indiana Central R. W. Co. v. Oakes*, 20 Ind. 9, referred to by the appellant's counsel as supporting their views, Judge DAVISON, on p. 13, says: "It is, however, contended that until the plaintiffs had refused to relinquish their property to the corporation, or to accept a fair compensation therefor, the company had no authority under her charter to possess and use it; and having appropriated it without demanding such relinquishment, or offering such compensation, she was guilty of trespass. This proposition, when applied to the case before us, seems to be incorrect. The owners of the property being infants, were, for that reason, not of legal capacity to give a valid relinquishment, or to agree upon a fair compensation. And the defendants were therefore excused from the demand and offer, which, in ordinary cases, are required by her charter."

By the clearest implication the court holds that, in a case like this, there must be such demand and offer. Whether or not the infancy of the land-owner should be held to enlarge the power of the company, and enable it to enter upon land which, but for such infancy, it would have no right to take, is a question not involved in this case, as the appellees are not alleged to have been infants at the time the entry was made.

The case of *Swinney v. The Ft. Wayne, etc., R. R. Co.*, 59

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Ind. 205, is referred to by the appellant as supporting its position. It seems to have been held, in this case, that it was unnecessary, in proceedings by a railroad company to appropriate land for railroad purposes, to aver and prove that an effort had been made to agree with the owner for the purchase of the land proposed to be appropriated. The question arose upon an appeal from an assessment of damages, and it might well have been held that, upon appeal, the question should be considered as waived ; that, if the owner wished to raise such a question, he should do it by a proceeding to enjoin the company. This is not the reason assigned by the court, it is true, and it may have had no influence in the determination of the question, but if the decision means that where a statute authorizes a railroad company to institute proceedings to condemn the land of others, upon its failure to agree with the owner for the purchase of the property, it may, without any effort so to agree and in disregard of the statute, at once institute proceedings to condemn, we are not disposed to follow the decision. The language of the general statute upon the subject differs, in some respects, from the 3d section of the act of 1849. Under the latter we think it clear that a demand of the relinquishment of title and the offer of fair compensation are conditions precedent to the right of appellant to enter upon and take possession of the lands of others.

Assuming that the entry of the appellant was valid, we are unable to see how the limitation insisted upon could be avoided ; but, holding as we do, that its entry and possession were unauthorized and wrongful, it could thereby secure no right as against the appellees. *Meriam v. Brown*, 128 Mass. 391 ; *Daniels v. The Chicago, etc., R. R. Co.*, 35 Iowa, 129 ; *Doe v. The Manchester, etc., R. W. Co.*, 14 M. & W. 687 ; *Stacey v. The Vermont, etc., R. R. Co.*, 27 Vt. 39.

The decision below should be affirmed.

Robinson v. Wise et al.

PER CURIAM.—It is ordered that, upon the foregoing opinion, this cause be in all things affirmed, at the costs of the appellant.

NOTE.—ELLIOTT, J., having been of counsel in this case, was absent.

No. 7804.

ROBINSON v. WISE ET AL.

PRACTICE.—*Dismissal for want of Prosecution.—Change of Venue.—Continuance.—Supreme Court.*—Where the correctness of the ruling of the trial court in dismissing a cause for want of prosecution is not questioned, the Supreme Court will not go back of such ruling to consider assignments of error attacking the rulings refusing a change of venue and denying a continuance.

From the Huntington Circuit Court.

J. B. Kenner, for appellant.

ELLIOTT, J.—Appellant was the plaintiff below. In that court motions were made by the appellant for a change of venue and for a continuance. Both of these motions were overruled. After these motions had been overruled, the cause was called for trial and dismissed for want of prosecution, and judgment rendered against the appellant for costs. Appellant moved for a new trial, assigning, in support of his motion, two causes: 1st, the overruling of his motion for a change of venue; 2d, overruling his motion for a continuance.

The record does not present any question for our consideration. The only causes assigned for a new trial are based upon rulings made prior to the order of dismissal, and were disposed of by that order. As the appellant does not, by his motion, attack the correctness of the ruling dismissing

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the cause for want of prosecution, we must regard him as in effect acquiescing in such dismissal. There is no attack at all made upon the order of dismissal, and we cannot go back of it to consider the questions upon the rulings refusing a change of venue, and denying a continuance. If the appellant refused to prosecute his action, the court did right in dismissing it, and it is immaterial what errors were committed at an earlier stage of the proceedings. We must presume that the court did do right, until the appellant, by a proper motion and upon sufficient grounds, satisfies us that the order of dismissal was erroneous.

Judgment affirmed.

 No. 7258.

SNYDER v. BABER.

PARTNERSHIP.—Complaint.—Conversion.—Demand.—In a complaint, by one partner against another, after dissolution and settlement, alleging an agreement by the defendant to collect assets of the firm and apply them in payment of outstanding liabilities of the firm, and charging a conversion of the money collected to his own use and the use of others, it is unnecessary to aver a demand before the commencement of the suit.

SAME.—Implied Demand.—An allegation that the defendant refused to account implies a demand for an accounting.

PLEADING.—Motion to make more Specific.—Demurrer.—If an allegation be not sufficiently certain, a motion to make more specific, and not a demurrer for want of facts, is the remedy.

From the Gibson Circuit Court.

T. R. Paxton, for appellant.

W. M. Land and *J. E. McCullough*, for appellee.

Howk, C. J.—The sufficiency of the appellee's complaint to withstand a demurrer thereto for the want of facts is the

74	47
183	33
74	47
144	683
74	47
160	91

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only question presented for the decision of this court, by the record of this cause and the appellant's assignment of error thereon.

In his complaint, the appellee alleged, in substance, that on and before the 7th day of April, 1876, he and the appellant were co-partners in the business of carriage-making in the town of Princeton, in Gibson county, under the firm name of George W. Snyder & Co.; that they, as such co-partners, had each an equal interest in the business, stock and assets of said firm, and a like equal interest in the profits of said business; that on the 7th day of April, 1876, the said partnership was dissolved by the mutual consent of said partners, and all the business of said firm was fully and finally settled and adjusted by and between them, saving and excepting certain outstanding liabilities of said firm, an itemized list of which was given, amounting in the aggregate to \$1,114.65, and certain assets of the firm amounting to \$1,459.20; that the said assets were of the aggregate value stated and were \$344.55 more than the outstanding liabilities of said firm; that upon the dissolution and settlement of said firm, as aforesaid, by agreement between the said parties, all the said assets of the firm, of the value aforesaid, were turned over to and received by the appellant, to be by him collected and applied in payment of said outstanding liabilities, which the appellant, in consideration of the premises, agreed and undertook to do; that the appellant had collected and converted to his own use, and to the use of others, all of the said assets, of the value aforesaid, and in violation of said agreement, and of the appellee's rights, had failed and refused to apply the same to the payment of said outstanding liabilities, leaving a large portion thereof unpaid; that, by reason thereof, the appellee had been compelled to advance, and had advanced and paid, out of his own individual funds, on said outstanding indebtedness of the firm, that might and ought to have been paid

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by the appellant out of the said partnership assets so in his hands, certain specified sums amounting in the aggregate to \$307.65, which remained unpaid to appellee; that all the indebtedness of said firm had been fully paid and satisfied, and that there were no outstanding debts or unsettled liabilities against said firm; and that the appellant refused to account to the appellee for the assets of said firm, placed in his hands as aforesaid, over and in excess of the firm's liabilities, or to repay the appellee the aforesaid sum so advanced by him to pay said liabilities, to his damage in the sum of \$500, for which he demanded judgment.

The appellant's counsel objects, in argument, to the sufficiency of the appellee's complaint, "because it does not allege a demand before suit, by appellee of appellant, for an accounting together and payment to appellee of the amount due him, if any, from appellant." We are of the opinion, however, that, under the allegations of the complaint, a demand before suit brought, for an accounting together and payment of the amount due, was not necessary to the maintenance of the action, and that, for this reason, it was not necessary to the validity or sufficiency of the complaint that it should contain an averment of any such demand. We have given a full summary of the allegations of the complaint, and it will be seen therefrom that the appellee averred, in clear and positive terms, that, at the time of the dissolution of the firm, there was a full and final settlement and adjustment of all the business of said firm by and between him and the appellant, except as to certain outstanding liabilities and certain specified assets of said firm; that the aggregate value of said assets exceeded the amount of said liabilities in the sum of \$344.55; that, by an agreement then made between the said parties, all the said assets were turned over to and received by the appellant, to be by him collected and applied to the payment of said liabilities, which he, in consideration of the premises, agreed and un-

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dertook to do ; and that he, the appellant, had collected all the said assets, and had converted the same to his own use and the use of others, and, in violation of his agreement and of the appellee's rights, had failed and refused to apply the same to the payment of said liabilities, etc. It will be seen that, in and by these allegations, the appellant was expressly charged with the conversion of the money, received by him for a specific purpose, to his own use and the use of others. The rule of pleading is well settled by the decisions of this court, that where, as in this case, an actual conversion of the money sued for has been alleged in the complaint, it is wholly unnecessary to aver therein a demand made before the commencement of the suit. *Robinson v. Skipworth*, 23 Ind. 311 ; *Ferguson v. Dunn's Adm'r*, 28 Ind. 58 ; *The Jeffersonville, etc., R. R. Co. v. Gent*, 35 Ind. 39 ; *Nelson v. Corwin*, 59 Ind. 489 ; *Proctor v. Cole*, 66 Ind. 576 ; *Bunger v. Roddy*, 70 Ind. 26.

It was also alleged in the complaint, that the appellant refused to account to the appellee for the assets of the firm, placed in his hands, in excess of the firm's liabilities, etc. It seems to us, that a demand for an accounting, before suit brought, is necessarily implied in and by this allegation ; for there could be no refusal to account by the appellant, without a demand for an accounting previously made by the appellee. If the allegation was not sufficiently certain, in regard to the demand for an accounting, the appellant's remedy was a motion to make more specific, and not a demurrer for the want of facts ; for, when the appellant admitted, as he did by his demurrer, that he had refused to account to the appellee, he also admitted by necessary implication, that the appellee had demanded of him the accounting which he had refused.

Our conclusion is, that the appellee's complaint was sufficient, and that the appellant's demurrer thereto, for the want of facts, was correctly overruled.

The judgment is affirmed, at the appellant's costs.

Hosbrook v. Schooley, Administrator, *et al.*

No. 7915.

HOSBROOK v. SCHOOLEY, ADMINISTRATOR, ET AL.

TAX TITLE.—*Interest on Taxes Paid by Holder.*—The holder of an invalid tax title to land sold for taxes is entitled to twenty-five per cent. interest per annum on the amount of taxes paid by him on such land, under section 257 of the act relating to the assessment of taxes, 1 R. S. 1876, p. 72.

From the Marion Circuit Court.

L. Barbour, for appellant.

BEST, C.—Thomas Schooley, one of the appellees, as administrator of the estate of Joseph A. Yancey, deceased, brought this suit against his co-appellees, as heirs of the decedent, to obtain an order to sell the real estate described in his complaint, for the payment of the decedent's debts, and against the appellant because he claimed a lien upon, or an interest in, said realty. The appellant appeared and filed a cross complaint, in which he claimed title to said land through a tax deed made August 28th, 1877. Issues were formed, submitted to the court, and a finding made that the appellee Schooley was entitled to an order to sell the land, as against all the other parties; that appellant's title was invalid, but that he was entitled to the sum of \$654⁵⁵/₁₀₀, to be first paid out of the proceeds of said sale. The appellant moved for a new trial, because the amount assessed in his favor was too small; but the court overruled his motion, and he reserved an exception. Final judgment, from which he appeals, and assigns as error the ruling of the court in refusing to sustain his motion for a new trial.

The only question in the case is as to the amount of interest appellant should have been allowed. The evidence is in the record, and shows that interest was computed upon the amount of taxes paid by him upon the land at the rate of six, instead of twenty-five, per centum per annum. The case made, as it seems to us, presents the same question that

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was decided by this court in *Flinn v. Parsons*, 60 Ind. 573, and in *Duke v. Brown*, 65 Ind. 25, in each of which it was held that the purchaser was entitled to interest at the rate of twenty-five per cent. per annum. The ruling in the case below was made after the above cases were decided, and we have been somewhat apprehensive that some reason existed why the rule therein announced was not applicable to this case; but, unaided by the appellee, who has not filed a brief, we have been unable to discover any, and therefore conclude that the court erred in not allowing interest at the greater rate.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, in all things reversed, at the costs of the appellee Schooley; cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings.

No. 9293.

SUMNER v. THE STATE.

CRIMINAL LAW.—*Gaming Table.*—*Indictment.*—*Evidence.*—*Variance.*—

Under an indictment charging the defendant with keeping and exhibiting a pool table for the purposes of gaming, evidence that he kept a billiard table and not a pool table is a fatal variance.

SAME.—*Statute Construed.*—*Evidence.*—The clause, “for the purpose of wagering,” in section 74, 2 R. S. 1876, p. 480, making it a misdemeanor for one to keep a gaming table, means “for the purpose of” (himself) “wagering,” and not for the purpose of permitting others to wager thereon; and where, in a prosecution under said section, the evidence fails to show that the defendant kept or exhibited the table for the purpose of wagering thereon, or that he ever did wager thereon, though he permitted others to do so, it is insufficient to warrant a conviction.

SAME.—A criminal statute will not be extended by construction beyond what its terms fairly import.

Sumner v. The State.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellant.

D. P. Baldwin, Attorney General, *S. O. Pickens*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

WORDEN, J.—An indictment was found against the appellant in the court below, charging that “at said county of Greene, on the 15th day of January, 1880, and on divers other days and times between that day and the day of making this presentment, one William Sumner was unlawfully the keeper and exhibitor of, and did then and there unlawfully keep and exhibit, a certain gaming table, commonly known as a pool table, for the purpose of wagering articles of value upon the result of games played thereon, contrary,” etc. On trial of the cause, the defendant was convicted and fined, a motion made by him for a new trial having been overruled.

The evidence is in the record, from which it appeared that the defendant kept a billiard table, but none that he kept a pool table. The variance would seem to have been fatal. *Bartender v. The State*, 51 Ind. 73; *Squier v. The State*, 66 Ind. 317, 604.

But there is another and more substantial point, in respect to which the evidence was radically defective. To say the most of the evidence favorable to the State, it tended to show that the appellant kept a billiard table on which he suffered third persons to play billiards, they paying him for the use of the table, the loser of the game sometimes paying for the use of the table. Whether or not the persons thus playing, with an understanding that the loser of the game should pay for the use of the table, were gambling, is a question which we need not decide, and one upon which the authorities are not uniform. See some authorities upon this point collected in the case of *Carr v. The State*, 50 Ind.

Kolle et al. v. Foltz et al.

178, 181. The indictment in the present case is based upon the following statutory provision :

“Every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffle-boards, faro bank, nine-pin alley, or billiard table, or any other gaming apparatus, for the purpose of wagering any article of value therein, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.” 2 R. S. 1876, p. 480, sec. 74.

The person guilty under the above provision must have kept or exhibited the gaming apparatus “for the purpose of wagering,” etc. This language clearly means, “for the purpose of” (himself) “wagering,” and not for the purpose of permitting others to wager thereon. A criminal statute will not be extended by construction beyond what its terms fairly import.

The evidence entirely fails to show that the appellant kept or exhibited the table for the purpose of wagering thereon, or that he ever did wager thereon, though he may have permitted others to do so.

The judgment below is reversed, and the cause remanded for a new trial.

No. 7163.

KOLLE ET AL. *v.* FOLTZ ET AL.

74	54
135	608
74	54
140	298

PRACTICE.—*Exception.—When Taken.—Record.*—Section 343, 2 R. S. 1876, p. 176, imperatively requires an exception to the decision of the court to be taken at the time it is made, although time may be given to reduce the exception to writing; and, where the record entry on appeal shows an exception at one term to a ruling at a former term, no available question is reserved thereby.

Kolle *et al.* v. Foltz *et al.*

From the Vanderburgh Superior Court.

R. A. Hill, for appellants.

*C. Denby, D. B. Kumler, F. W. Cook and H. V. Ben-
nighof*, for appellees.

ELLIOTT, J.—On the eighteenth day of the January term, 1878, of the Superior Court of Vanderburgh county, a demurrer was sustained to appellants' complaint, and leave to amend was granted. At the next term of said court the following proceedings were had: "Now come the plaintiffs, by Robert A. Hill, their attorney, and withdraws his motion for leave to amend their complaint, and enters his exceptions to the ruling of the court on the demurrer to the complaint heretofore rendered herein." We have copied literally from the record, and, although the entry is a very clumsy one, we think that the exception entered may be fairly said to be that of the appellants, and not of Robert A. Hill, their attorney. The language, if literally interpreted, would mean that the exception was that of the attorney, and not that of the appellants.

It is insisted by appellees that there was no exception taken at the time to the ruling on the demurrer, and that there is, therefore, no question so reserved as to be available upon appeal. The language contained in the extract made from the record, "and enters his exceptions to the ruling of the court, on the demurrer to the complaint heretofore rendered herein," shows, not an exception taken at the time the ruling was made, but an exception to a ruling made at a former term. It is impossible, without violating all rules of construction, to attach any other meaning to the words quoted; they refer not to the present, but to the past. The code imperatively requires that the exception shall be taken at the time. The 343d section provides that "The party objecting to the decision must except at the time the decision is made." The provisions of the statute upon the subject are unusually

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explicit. The exception must be taken "at the time the decision is made; but time may be given to reduce the exception to writing." There is a very material difference between the act of excepting, and the act of putting the exception in writing. Time may be allowed for the latter, but not for the former. The power given the court is to allow time to put the exception in form, not to grant time for the interposition of the exception itself.

The judgment must be affirmed.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

No. 8201.

LOCKWOOD ET AL. v. DILLS, ADMINISTRATOR.

JUDGMENT.—*Transcript.*—*Admission.*—*Evidence.*—The admission on the trial of a cause, that a transcript of a judgment offered in evidence is valid, is not an admission that the judgment of which it is a copy is also valid.

PRACTICE.—*Special Finding.*—*Exception.*—An exception to the conclusions of law by the court upon a special finding of facts is an admission that the facts are correctly found.

SAME.—*New Trial.*—If the court finds the facts contrary to the evidence, whether by admission or otherwise, the remedy is by a motion for a new trial, and not by an exception to the conclusions of law on such finding.

REPLEVIN BAIL.—*Invalid Entry.*—Writing an undertaking of replevin bail upon a separate piece of paper, and attaching it to the page of the docket of a justice of the peace, on which the judgment appears, by pinning it thereto, is not "entering" it upon such docket within the meaning of section 84, 2 R. S. 1876, p. 632, and such undertaking is therefore invalid as a recognizance of replevin bail.

From the DeKalb Circuit Court.

P. J. Lockwood, W. L. Penfield and C. E. Emanuel, for appellants.

J. E. Rose, E. D. Hartman and W. H. Dills, for appellee.

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BEST, C.—The appellee brought this suit, as administrator of the estate of John Whittington, deceased, against John J. Whittington, the only son of said decedent, to obtain an order to sell lot No. six (6), in Auburn Junction, DeKalb county, Indiana, of which said decedent died seized, for the payment of his debts, and against the appellants to enjoin them from selling said lot upon an execution then in the hands of Augustus S. Leas, as sheriff, in favor of Alonzo Lockwood, his co-appellant.

John J. Whittington appeared, and consented to an order for the sale of the lot. Appellants demurred to the complaint for want of facts, which was overruled, and they excepted. They then filed an answer in denial. The issue was submitted to the court for trial, with a request by appellants that the court find the facts specially, and state its conclusions of law thereon. This was done, and the appellants excepted to the conclusions of law. Final judgment was rendered for appellee, from which the appellants appeal and assign as error that the court erred in its conclusions of law upon the facts found. Other errors are assigned, but as this one presents the only questions argued by appellants, the others will not be noticed.

The facts as found are briefly these: That on November 22d, 1876, Alonzo Lockwood recovered a judgment against one Nathan Tarney for \$86.63, before John S. Barnes, a justice of the peace of DeKalb county, Indiana; that, on said day the decedent wrote upon a piece of paper the usual undertaking for the stay of an execution upon said judgment, signed the same, which was attested by said justice upon said paper, and then by said justice attached to his docket, by pinning it to and across the face of the leaf upon which said judgment was entered, and not otherwise; that at the time said undertaking was written, the whole of the page of said docket upon which it was attached was filled with the entry of said judgment, but there was sufficient room on the

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margin of said leaf, and at least twenty lines on the next page, immediately after the entry of said judgment, upon which said undertaking could have been written ; that on the 20th day of December, 1877, said Alonzo Lockwood caused a transcript of said judgment and of said undertaking to be filed in the clerk's office of said county, which was duly entered in the proper order-book, and the judgment docketed on the judgment docket ; that on the 20th of January, 1879, said Alonzo Lockwood procured from said John S. Barnes a certificate that an execution, issued upon said judgment, had been returned unsatisfied, and filed the same in said clerk's office ; that said Barnes, when he made said certificate, was not an acting justice of the peace, his term of office having expired the 24th of the preceding October ; that on the 28th day of March, 1879, the clerk of said county issued an execution upon said judgment, and delivered it to Augustus S. Leas, sheriff, who levied upon said lot, and advertised to sell it upon the 3d of May, 1879 ; that on the 11th of April, 1879, said decedent died intestate, seized of said lot, leaving said John J. Whittington his only heir ; that on April 28th, 1879, the appellee was duly appointed administrator of said estate ; that the personalty was insufficient to pay the debts of said decedent, and that said Tarney never had any interest in said lot. The court further found "that it is admitted by the parties that said transcript is in all respects conformable to law, and valid, unless it is rendered invalid by the form of the certificate attached thereto," which certificate is set out in the finding.

The court adjudged said undertaking to be illegal and void, enjoined appellants from selling said lot upon said execution, and from attempting to enforce said judgment as a lien upon said lot.

Appellants, in their brief, concede that said execution was void, but complain of that part of the judgment which perpetually enjoins them from attempting to enforce said judg-

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ment as a lien upon said lot, and, in support of their position, insist, first, that the admission that the transcript was valid was equivalent to finding that said judgment was a lien on said lot; and, second, that said undertaking was a valid recognizance of replevin bail. We do not concur with them in either position. An admission that the transcript was valid could not mean more than that it was correct. It could not mean that the transcript was not only correct, but that the judgment, of which it was a copy, was also valid. A transcript of a void judgment properly certified is a valid transcript. If the certificate was sufficient, the admission added nothing to its validity; if not, the admission supplied its place. It may also have excused its production upon the trial; but, whether produced or its absence supplied by the admission, it would only have been evidence of the validity of the undertaking in question. With both, the appellee could still have disputed its validity. *Remington v. Henry*, 6 Blackf. 63.

Again, if the admission was sufficient to establish the fact that the judgment was a lien on the lot, and the court should have so found, yet, as it did not, the appellants can not present that question by an exception to the conclusion of law by the court. Such an exception is an admission that the facts are correctly found. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, *post*, p. 110.

If the court found the facts contrary to the evidence, whether by admission or otherwise, the remedy was by a motion for a new trial, and not by an exception to the conclusions of law by the court. *Buskirk's Practice*, p. 206.

The statute provides that the judgment defendant may have stay of execution by entering replevin bail on the docket of the justice. 2 R. S. 1876, p. 632, sec. 84.

It is by statute alone that judgments can be replevied, and the mode of doing it, as prescribed by the statute, must be observed, to make it valid. *Lowe v. Blair*, 6 Blackf. 282.

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The mode prescribed by the statute is by "entering" it on the docket; and this court, in *McCormick v. Cassell*, 16 Ind. 408, a case where an undertaking of replevin bail had been entered upon the back of an execution held by a constable, among other reasons given for its invalidity, said it was "not valid as a recognizance of replevin bail, because not entered on the docket of the justice."

"Entering" on the docket of the justice is to write the undertaking upon the docket as other judgments are written upon, or recorded in, such docket. To write the undertaking upon a separate piece of paper and attach it to the docket, by pinning it thereto, is not "entering" it upon the docket, within the meaning of the statute, and therefore the undertaking was not valid as a recognizance of replevin bail.

For these reasons, we think the court did not err in its conclusions of law.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be, and is hereby, in all things affirmed, at the costs of the appellants.

No. 9172.

GARFIELD v. THE STATE.

CRIMINAL LAW.—Instruction.—Reasonable Doubt.—An instruction, that the jury should be so convinced by the evidence, that, as prudent men, they would feel safe to act upon such conviction in matters of the highest concern to their own dearest and most important interests, under circumstances where there was no compulsion or coercion upon them to act at all, is not an essential departure from the doctrine of reasonable doubt as laid down in *Bradley v. The State*, 31 Ind. 492.

SAME.—Teachings of Experience.—An instruction, that "It is not uncommon for different witnesses of the same conversation to give pre-

74	60
128	194

74	60
133	690

74	60
138	305

74	60
144	246
144	495

74	60
148	258

74	60
154	640
155	270

74	60
157	386

74	60
160	550

74	60
164	161

74	60
167	213
168	161

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cisely opposite accounts of it," etc., does not contain a proposition of law, but only declarations of supposed facts which must be left to the jury, in the light of their experience.

SAME.—Harmless Error.—It is no cause for complaint that such an instruction has been refused when the grounds for distrusting and doubting testimony have been fully and clearly stated in other instructions given at the defendant's request.

SAME.—Doubts not Equivalent.—It was not error to refuse to instruct the jury that they must acquit the defendant, if they had a reasonable doubt as to whether he left B. on the 1st of December, and was present at the house of S. B. on the morning of the 2d of December, 1879. The court could not say as matter of law, that a doubt whether the defendant left B. on December 1st was equivalent to a doubt whether he was present at the time and place of the offence.

LARCENY.—Bank Bills and Money.—Personal Goods.—Under section 24, 2 R. S. 1876, p. 435, the phrase "goods and chattels," in an indictment, means "personal goods, of which larceny may be committed," and includes "bank bills and money."

From the DeKalb Circuit Court.

J. Morris and *W. L. Penfield*, for appellant.

D. P. Baldwin, Attorney General, *G. B. Adams*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

WOODS, J.—The appellant was arraigned upon the third, fourth and fifth counts of the indictment against him, and, on a trial by jury, was found guilty of burglary, as charged in the third count, and was sentenced, in accordance with the verdict, to imprisonment in the state-prison for the period of ten years.

Exception was saved to the overruling of the motion to quash, and error has been assigned on the ruling, but counsel have pointed out no objection to the count on which the conviction was had. It is needless to give a copy of it.

The questions discussed by counsel, and on which counsel for the appellant rely for a reversal of the judgment, arise out of the overruling of the motion for a new trial, and relate mainly to the giving and refusing of instructions.

The last instruction given was prepared by the court of its own motion, and was as follows:

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“The rule of law touching reasonable doubts is a practical rule for the guidance of practical men when engaged in the solemn duty of assisting in the administration of justice. It is not therefore a rule about which there is anything whimsical or chimerical. It is not a mere possibility of error or mistake that constitutes such reasonable doubt. Despite every precaution that may be taken to prevent it, there may be, in all matters pertaining to human affairs, a mere possibility of error. If, then, you are so convinced by the evidence, of whatever class it may be, and considering all the facts and circumstances in evidence as a whole, of the guilt of the defendant, that as prudent men you would feel safe to act upon such conviction in matters of the highest concern and importance to your own dearest and most important interests, under circumstances where there was no compulsion or coercion upon you to act at all, then you will have attained such degree of certainty as excludes reasonable doubt and authorizes conviction.”

“The appellant complains of this instruction, for the reason that it contains an inaccurate and incomplete statement of the law of reasonable doubt and conflicts with the statement of the law on the subject, in *Bradley v. The State*, 31 Ind. 492, which was copied *verbatim* into special instruction No. 15, given at the instance of the appellant. This general instruction lowered the criterion of reasonable doubt as set forth in special instruction No. 15. It emasculates the law of reasonable doubt as laid down in *Bradley v. The State*, and ever since approved.” “In the general instruction the jury are charged that if they would feel safe to act upon the conviction, etc. But in *Bradley v. The State* this court went further, and held that it must induce such faith in the truth of the facts which the evidence tends to establish, that a prudent man might without distrust voluntarily act on their assumed existence ;” and, extending their argument in this vein, counsel insist that the certainty which enables a pru-

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dent man "to feel safe in acting" is greatly different from, and inferior to, the degree of certainty which would enable the prudent man "to act voluntarily and without distrust."

The case of *Bradley v. The State* recognizes both these expressions as proper statements of the law, and the difference between them is not such as to justify an interference with the verdict. Since the promulgation of the opinion in *Bradley v. The State*, it has become a common practice in criminal cases for the defendants to ask, and the courts to give, instructions worded like those under consideration, but it may well be doubted whether they are entirely intelligible to the minds of average jurors, and whether other forms of expression could not be found, which would be equally accurate and much better understood by the untrained men of whom the juries are ordinarily composed; for instance, the expression quoted from Burrill, that moral certainty "is a state of impression produced by facts, in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it; the conclusion presented being one which can not, morally speaking, be avoided, consistently with adherence to truth." *Bradley v. The State, supra*; Burrill Cir. Ev. 199.

The appellant asked the following instruction, which the court refused, namely:

"13. It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and sometimes a witness may testify to statements as coming from one party when they actually came from another; and sometimes, too, a witness, with the best of intentions, may repeat the declarations of a party as having been made against himself when, in fact, the statement was actually made in his own favor."

In support of this instruction, reference is made to a note to sec. 200, vol. 1, of Greenleaf's Evidence. It is not every statement of the law found in a text-book or opinion of a

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judge, however well and accurately put, which can properly be embodied in an instruction. The processes of reasoning by which a conclusion is reached, if well made, are appropriate to be found either in text or opinion, but rarely, if ever, is it proper to deliver such reasoning to a jury in the form of instructions. The instruction under consideration does not contain a single proposition of law, but only declarations of supposed facts, which common experience has perhaps established as true. The teachings of experience on questions of fact are not, however, doctrines of law, which may be announced as such from the bench, nor yet are they matters of proof to be shown as other facts in the case. They may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other side asserting another conclusion, but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact. The most that the judge may do, under our practice, which leaves questions of fact entirely to the jury, is to direct the attention of the jurors to such propositions and leave them, in the light of their experience, to say what credit should be given to any testimony on account of its alleged doubtful character. As to the instruction proposed, it may well be disputed whether it can be truly said to be "not uncommon for different witnesses of the same conversation to give *precisely opposite* accounts of it." Doubtless, it is not uncommon for them to give accounts differing more or less widely, amounting sometimes to direct opposition. But, as already said, these are subjects of discussion and argument before the jury, proper to be referred to in the instructions, but not to be controlled thereby.

But, aside from these considerations, the 12th and 14th instructions, given at the appellant's request, quite fully and clearly stated to the jury the grounds for distrusting and doubting the testimony in the case concerning the alleged declarations and admissions of the accused, and left no cause

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for complaint on account of the exclusion of No. 13. even if it were, in all respects, proper to have been given.

The following instruction was asked and refused: * * *

“You must acquit him if you have a reasonable doubt as to whether the defendant left Bryan on the 1st of December; if you have a reasonable doubt as to whether he was present at the house of Solomon Barney on the morning of 2d of December, 1879.”

The court very clearly instructed the jury that they should acquit the defendant if there was any doubt of his presence at the scene of the crime, and properly explained what was meant by presence; and, conceding for the argument, as counsel contend, that “the evidence on the part of the State shows, if it shows anything, that the appellant left Bryan (Ohio?) on December 1st, and that the burglary was committed on the evening of that day, or on the morning of December 2d, it does not follow that the instruction asked should have been given. The court could not say, as matter of law, that a doubt whether the defendant left Bryan on December 1st was equivalent to a doubt whether he was present at the time and place of the offence.

The only other consideration urged upon our attention is, that the verdict is not sustained by the evidence. The third count of the indictment, on which the conviction was had, charges the breaking “into the mansion house of Solomon Barney, then and there situate, with intent the goods and chattels of Solomon Barney” to steal, etc., and the claim is that the proof shows only an intent to steal *bank bills and money*, and that, in the law, these are not goods and chattels. We think the phrase “goods and chattels,” as used, means the personal goods of said Solomon Barney. By section 24 of the act defining felonies, 2 R. S. 1876, p. 435, it is provided, “Bonds, promissory notes, bank notes, treasury notes issued by the authority of the State of Indiana, canal scrip, bills of

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exchange, or other bills, orders, drafts, checks," etc., "shall be considered as personal goods, of which larceny may be committed."

We find no error in the record, and the judgment is affirmed, with costs.

No. 7385.

FEE ET AL. v. THE STATE, EX REL. PLEASANT.

APPEARANCE.—*Practice.*—*Service.*—*Record.*—Where the record shows neither a return of service of summons on a defendant, nor any appearance on his behalf, the entry, "come again the parties by their counsel," etc., is not binding upon him.

JUDGMENT.—*Default.*—*Record of Service and Return.*—*Appeal.*—Judgment by default can not be affirmed on appeal, unless the record contains a transcript of the summons, and the return of due service thereof; an express recital in the record, that there was proof of the issue and due service of process, is not sufficient.

PLEADING.—*Guardian's Additional Bond.*—*Defects Cured.*—A complaint on a guardian's bond averred that it was given as an additional bond for the sale of real estate, but the bond merely recited that, "If the above bound" defendant, "who is guardian of the person and property of" certain wards, "minor heirs of," etc., "then the above obligation is to be void, else to remain in full force."

Held, on demurrer, that the complaint sufficiently shows that it was given as an additional bond, and that, under section 790 of the code, it was a good bond for that purpose.

Held, also, that, where defects of form and recital appear on the face of a bond, a more particular suggestion of such defects is unnecessary.

SAME.—*Pleading.*—*Sureties.*—*Identity of Names and Persons.*—In such action, where the only averment of the execution of the bond is, that the guardian "executed his bond," and the only showing that the sureties joined in its execution is, that the names recited in the copy of the bond filed with the complaint are identical with the names of the defendants, and the names subscribed thereto either identical, or differing only in that the christian names are not given in full but abbreviated or by initials, such complaint is insufficient as against such sureties.

SAME.—*General Denial.*—*Proof.*—Under plea of general denial, the guardian in such action could prove that he had "fully performed all the conditions of said bond according to the tenor and legal effect thereof."

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From the Monroe Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellants.

J. W. Buskirk and *H. C. Duncan*, for appellee.

WOODS, J.—Suit by the appellee against William O. Fee, James Small, William H. Turner and Edwin Bullard, upon a bond, of which the following is a copy :

“We, Edwin Bullard, James Small, William O. Fee and William H. Turner, are bound unto the State of Indiana, in the sum of five thousand dollars, for the payment of which we bind ourselves jointly and severally, firmly by these presents. Sealed and dated this 6th day of December, 1865. If the above bound Edwin Bullard, who is guardian of the person and property of Martha E., John F. and Zachariah T. Pleasant, minor heirs of John and Nancy Pleasant, deceased, then the above obligation is to be void, else to remain in full force.

50 cts.
U. S.
Rev. Stp

(Signed) “EDWIN BULLARD, [L. S.]
“JAMES SMALL, [L. S.]
“WM. O. FEE, [L. S.]
“W. H. TURNER. [L. S.]

The complaint charges that said Bullard had been appointed guardian of the relator, and as such had “procured an order of the Monroe Court of Common Pleas to sell certain real estate belonging to the said relator and other minor heirs of John Pleasant, deceased, and thereupon executed his bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of the duties of said trust, and to faithfully account for the proceeds of said sale ;” and that, of the proceeds of the sale made under said order, the said guardian had converted three thousand dollars to his own use, and had failed to account therefor to the relator, who had become of lawful age. A copy of the bond was filed with and made a part of the complaint.

The appellants Fee and Small have assigned as error the

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overruling of their demurrer to the complaint, for want of facts stated sufficient to show a good cause of action against them; and the appellant Turner claims that the judgment against him is erroneous because rendered without the service of process, and without any appearance by or for him.

The record shows neither a return of service of a summons on said Turner, nor any appearance on his behalf. The other defendants appeared by attorney, and filed demurrers and answers, and took other steps in the case; and there is an entry in the record of the tenor following: "Come again the parties, by their counsel, and this cause, being at issue, is now submitted to the court for trial," etc. But this entry is binding only upon those for whom there had been an actual appearance, which must be shown affirmatively in some part of the record. A judgment by default, it is well settled, can not be affirmed on appeal unless the record contains a transcript of a summons and a return of due service thereof; an express recital in the record, that there was proof of the issue and due service of process, is not sufficient; and it would be intolerable if men could be brought into the conclusive and irreversible obligation of a judgment by force of loose recitals of a clerk, such as the one made in this case, when in truth they were neither present nor represented, and had no notice that the action was pending.

The judgment against said Turner must therefore be reversed.

In support of the demurrer of Fee and Small to the complaint, it is claimed that the bond sued on is not an additional bond, given on application for an order to sell real estate, but is, and from its terms and conditions can be deemed to be, only a general bond for the faithful performance of the duties of the guardianship, and therefore does not create any obligation to answer for the proceeds of the sale of real estate.

In the foregoing statement we have given literally so much

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of the complaint as refers to the bond, its execution, and the purpose for which it was made. We consider the averments sufficient to show that it was given as the additional bond which is required by law in cases of guardians' sales of real estate. It must, therefore, under the provisions of section 790 of the code, be held to be a good bond for the purpose for which it was executed. That section provides that "No official bond entered into by any officer, nor any bond, recognizance, or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance or written undertaking were perfect in all respects."

A bond taken or approved by a judge on the bench is taken by an officer in the discharge of the duties of his office. The bond in suit is therefore within both the letter and spirit of this law. The defects of form and recital are apparent on the face of the instrument, taken in connection with the alleged purpose for which it was executed, and consequently a more particular suggestion of the defects in the complaint was unnecessary. *Buskirk's Practice*, 302.

A further objection is made to the complaint by these appellants, that it does not show that they executed the bond. The only averment on the subject is that the guardian, Bullard, "executed his bond," and the only thing to show or suggest that the other defendants had joined in its execution is the fact that the names recited in the copy of the bond filed with the complaint are identical with the names of the

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defendants, and the names subscribed thereto are either identical or differ only in that the christian names are not given in full, but in abbreviated form or by initial letters. If the sufficiency of the complaint in this respect had not been questioned until after the trial, we should perhaps be justified in holding that the defect was cured by the verdict, but the appellants having presented the question at the earliest opportunity afforded them by the rules of practice, and in the appropriate mode specifically provided by the code, they are entitled to a decision whether, by the rules of pleading, the complaint does state facts sufficient to constitute a cause of action against them. The rule is familiar and fundamental, that a pleading must state facts, and it is not sufficient to state merely matters of evidence tending to show the facts which ought to be stated, unless the evidence is conclusive in its nature, and even then the better rule is to aver the fact, and not the evidence of it. The copy of the bond sued on is a necessary part of the complaint, and so the complaint may be regarded as showing that Bullard gave a bond purporting to be signed by the names thereto appearing, but this is far short of showing that those names were the names of the appellants, or that they were subscribed to the bond by the appellants or by their authority. Identity or similarity of names, in any case, can be no more than evidence of identity of persons, and standing alone can hardly be deemed to constitute *prima facie* proof. The demurrer should have been sustained.

As against Bullard, the complaint is unquestionably good, and if his second paragraph of answer, to which a demurrer was sustained, was good, no error was committed of which he can avail himself. He had pleaded a general denial, under which, if under any plea, he could have proved that he had "fully performed all the conditions of said bond according to the tenor and legal effect thereof." This was all there was in his special plea to which the demurrer was sustained.

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The judgment against the appellant Bullard is affirmed, with costs, but the judgment against the appellants Fee, Small and Turner, is reversed, with costs.

No. 7665.

SHOEMAKER v. SMITH.

APPEAL.—*Interlocutory Order.*—*Assignment of Error.*—*Change of Judge.*—

A refusal to change the judge may be assigned as error on appeal from an order appointing a receiver, the rule that a refusal to change the venue must be assigned as a cause, in a motion for a new trial, not being applicable in such case.

RULE OF COURT.—*Motion for Change of Judge.*—*Cause for.*—A rule of court, requiring an application for a change of judge to be filed on or before the second day of the term, can not deprive a party of the right to a change of judge, upon motion made after the second day of the term, where his affidavit, properly setting forth a statutory cause, shows that he did not discover such cause, until the day of the making of the motion.

PLEADING.—*Cross Complaint.*—*Partnership.*—*Receiver.*—A cross complaint, to withstand a demurrer for want of facts, must, like a complaint, state facts sufficient to constitute a cause of action; and, in an action by a member of a firm against his partner, a cross complaint asking a dissolution and the appointment of a receiver, which alleged, in substance, only that the firm was largely indebted and was not making money, showed no ground for relief.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan, C. L. Taylor, J. East
and *C. F. McNutt*, for appellant.

J. H. Loudon and *R. W. Miers*, for appellee.

BEST, C.—The appellant commenced this suit against the appellee. His complaint contained five paragraphs. A demurrer was sustained to the fifth, and overruled to the others. The first, second and third averred, in various ways, sub-

74	71
127	318
74	71
133	360
74	71
135	676
74	71
145	42
146	246
74	71
155	284

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stantially, these facts: That on the 1st day of May, 1875, the appellant and appellee entered into a written agreement, a copy of which is set out, whereby they agreed to become partners in the drug business, at Bloomington, Indiana; that, in pursuance of said agreement, the appellant put as capital into said firm his stock of drugs, worth \$8,500; that he gave it thenceforward his time and attention; that he also put into said firm \$2,500 of his own means, and otherwise fully performed his part of said contract; that the appellee did not perform his part of said contract in this, that he only put into said firm \$396.15; that shortly thereafter he withdrew from said firm an equal amount, and, in addition thereto, he has drawn from said firm a sum in excess of the profits of the business, and has not a dollar in said firm; that, relying upon the appellee's promise to furnish his proportion of the capital, said firm, with a view of increasing its facilities for doing business, expended \$500 in advertising, \$1,000 in buying wagons, and \$1,000 in procuring a travelling salesman; that, by reason of appellee's failure to furnish said capital, said firm was compelled to borrow an equal sum of money, at a high rate of interest, and thereby lost \$1,000; that appellee, although often requested, had refused to pay into said firm or to pay appellant such sum as would make them equal; that the claims of said firm amount to \$7,050.59, many of which can not be collected; that its debts amount to \$4,094.88, and that the stock on hand, though larger than when they commenced business, is not so valuable, on account of a decline in prices. Prayer that the firm be dissolved, that an accounting be had, and that appellant have judgment for \$8,000.

In the fourth it is averred, in addition to what is alleged in the other paragraphs, that, by a mutual mistake of the parties, the written agreement does not contain, as it should have done, a stipulation that each was to furnish an equal amount of capital, and to be equal partners, concluding with

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a prayer for a reformation of the contract, for a dissolution, and for judgment for \$8,000.

A summary of the contract is as follows:

1st. The firm name shall be J. W. Shoemaker & Co.

2d. "Each partner shall furnish the capital as he conveniently can, and, when required, the said Shoemaker will at once put into said business his stock of drugs, and said Smith will advance \$1,000 immediately."

3d. Said Shoemaker shall give his time, attention and best skill to the business of said firm, and said Smith is to give his counsel and advice when present, but not his personal attention.

4th. The accounts of the parties shall be entered upon the books, and be subject to the inspection of each.

5th. Neither shall assume any liability in the name of the firm on account of any other person.

6th. Each shall share equally in the gains and losses.

7th. Neither shall draw from the firm more than his share of the profits.

8th. In case of dissolution, each shall share in the assets in proportion to the amount of capital paid in by him.

9th. Said copartnership shall continue five years, unless sooner dissolved by mutual consent.

The appellee filed an answer in denial and a cross complaint. In the latter he averred, in substance, that he and the appellant are partners in the drug business, in Bloomington, Indiana, under the firm name of J. W. Shoemaker & Co.; that a large stock of drugs, belonging to said firm, is now in their store rooms in said city; that said firm is largely indebted; that each of said partners put into said firm parts of the capital stock, and that each has withdrawn something therefrom; that said firm has not been, and is not now, doing a profitable business, but this is not because of any fault of the defendant; that the facts respecting said firm and its business make this a proper cause for a dissolu-

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tion and an accounting, and the defendant joins the plaintiff in asking for a dissolution and for an accounting, also for the appointment of a receiver to administer the assets, pay the debts, and divide the surplus, according to the rights of the parties.

The appellee also filed a verified application for the appointment of a receiver, but, as the conclusion reached by us renders it unnecessary to set it out, it is not done.

The appellant filed a demurrer to the cross complaint, for want of facts. The demurrer was overruled, and he excepted. Thereupon he filed an answer in denial of the cross complaint; and, on February 1st, 1879, the twenty-fourth day of the term, he moved the court for a change of venue from the judge, upon the following affidavit:

“The plaintiff, John W. Shoemaker, being duly sworn, upon his oath says, that he can not have a fair and impartial trial of this cause before the Honorable E. D. Pearson, judge of said court, before whom said cause is pending, on account of the bias and prejudice of him the said Pearson; that the said Shoemaker did not discover the said bias and prejudice of the said Pearson, until the 1st day of February, 1879.”

This motion the court overruled, for the reason that it was made too late, under rule 24 of said court, which is as follows: “Application for change of the judge must be filed on or before the second day of the term.” To which ruling the appellant, at the time, excepted.

Afterward the appellant moved to submit the issues for trial to a jury; but the court overruled such motion, except as to the issue formed upon the fourth paragraph of the complaint, and instead thereof, on the motion of the appellee, upon the pleadings and verified petition, ordered a dissolution of said firm, appointed a receiver and ordered him to take possession of the assets; to appraise and advertise them for sale in bulk after thirty days; if not thus sold, to then sell in parcels, and, within the meantime, to continue

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the business without making new additions to the stock ; to collect the claims of the firm, and to report his doings from term to term. The court also appointed said receiver a referee to take evidence respecting the interests of said parties in the assets of said firm, with directions to report at the next term ; and continued said cause. To which orders of the court, in declaring said firm dissolved, in appointing a receiver, and in appointing a referee, the appellant severally excepted, for the reason that the judge had no jurisdiction to determine the matter in issue, and for the reason that the showing was insufficient to authorize the appointment of a receiver.

From the order appointing a receiver, the appellant appeals, and assigns various errors, among which are the following : "The court erred in refusing to change the venue, in overruling the demurrer to the cross complaint, and in appointing a receiver."

The appellee insists that the refusal of the court to change the venue can not be considered on an appeal from an order appointing a receiver ; but we think otherwise. The refusal of the court to change the venue is ground for a new trial, and, after final judgment, can not be considered on appeal, unless it is assigned as a reason therefor. *Horton v. Wilson*, 25 Ind. 316. This is because the error may thus be corrected, and a failure to ask for a new trial for such cause is a waiver of it. *Kent v. Lawson*, 12 Ind. 675 ; *Butler v. Edgerton*, 15 Ind. 15.

A party, however, does not waive an objection which he has had no opportunity of making ; and, therefore, this rule does not apply on an appeal from an order appointing a receiver, as the law, in such proceeding, makes no provision for a new trial. Indeed, strictly speaking, there has been no trial, and therefore can not be a new trial upon such appeal. We think that all questions, upon which the validity or regularity of such appointment depends, are necessarily

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involved, and may be considered. If the court have no jurisdiction of the subject of the action, or of the person of the defendant, it would be error to appoint a receiver; and it is wholly immaterial, whether it failed to acquire jurisdiction by service of process, or, after acquiring it, lost it by the proper application for a change of venue from the judge. In either case the appointment would be error.

In *Krutz v. Howard*, 70 Ind. 174, an application for a change of venue from the judge was erroneously refused. And this court said: "When the court improperly refused the change of venue, * * * it had no further jurisdiction in the case, and could render no valid judgment against either of the defendants."

If the court improperly overruled the application for a change of venue, it had no power to appoint a receiver; therefore the correctness of this ruling is necessarily involved in this appeal.

The statute authorizes a change of venue whenever either party shall make and file an affidavit of the bias or prejudice of the judge before whom the cause is pending. 2 R. S. 1876, p. 116, sec. 207.

The affidavit filed in this case not only stated the causes prescribed by the statute, but stated that they were not discovered by appellant until the 1st day of February, 1879, the day when said motion was made.

The motion was overruled because a rule of court required such applications to be filed on or before the second day of the term. It has been repeatedly held that the court possesses the power to adopt such rules as are reasonable in the disposition of its business, and, when adopted, they are binding upon all parties in cases where they are applicable. A similar rule to this one was held valid in *Redman v. The State*, 28 Ind. 205, and in *Galloway v. The State*, 29 Ind. 442. The rule, though a reasonable one, can not, however, embrace causes not fairly within its spirit. A reasonable rule,

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thus applied, becomes an unreasonable one. If, after the second day of the term, another judge should be called to preside, such a rule certainly could not preclude a party from taking a change of venue from such judge. Such rule, in such case, would deprive him of a right conferred by the statute, without having had any opportunity to exercise it, and would not only be unreasonable, but would be absurd. Nor can any rule be reasonable which requires the party to make his application for a change before the causes which authorize it have arisen or have been discovered. A party can not be deprived of a statutory right by his failure to do either an unlawful or an impossible thing. This court said, in the case of *Galloway v. The State, supra*, that "We do not think the rule under consideration in this case should be construed to apply to a case where it is shown by the affidavit that the applicant was not aware of the alleged prejudice of the judge until the day on which the case is set down for trial." Appellant's Affidavit shows that the causes were not discovered till the day the application was made, and as the rule, for that reason, can not apply to this case, we think the court erred in refusing to change the venue.

We also think the court erred in overruling appellant's demurrer to the cross complaint. A cross complaint, to withstand a demurrer for want of facts, must, like any other, state facts sufficient to constitute a cause of action. *Ewing v. Patterson*, 35 Ind. 326. The only facts averred in the cross complaint are that the parties are partners; that the firm owns a large stock of goods; that it is largely indebted; that each has put in a part of the capital, and each has taken out a part; that, without the fault of the appellee, the firm has not done, and is not doing, a profitable business, and that the facts respecting its business require a dissolution. These facts did not entitle the appellee to any relief. There is no averment as to the contract by which the firm was formed, the time it was to exist, or the method

Hedrick *et al.* v. Hedrick.

of its dissolution. It is not averred that the appellant has violated his contract; that the firm, or either member of it, is not abundantly able to pay its liabilities, or that the appellant is not willing to dissolve the firm, pay the debts and divide the assets. In short, nothing is really averred, except that the firm is in debt, and is not making money. These facts furnish no ground for relief.

The cross complaint being insufficient, it was error to appoint a receiver. *High Receivers*, 595.

It is not necessary to determine whether the showing for the appointment of a receiver was sufficient, as the case should be reversed, and as the showing upon another application, if one is made, may be different.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and is in all things reversed, at the costs of the appellee, and the cause is remanded with instructions to sustain the demurrer to the cross complaint and the motion to change the venue.

No. 8262.

HEDRICK ET AL. v. HEDRICK.

PRACTICE.—*Evidence.*—*Bill of Exceptions.*—*Presumption.*—Where a question of law is reserved under section 347 of the code. the bill of exceptions must contain the evidence relating to the points of exception to a refusal of the court to permit certain questions to be asked a witness upon the trial of a cause; and, in the absence of such evidence, the Supreme Court will presume in favor of the ruling of the trial court.

From the Franklin Circuit Court.

J. F. McKee and *D. W. McKee*, for appellants.

S. S. Harrell, for appellee.

Hedrick *et al.* v. Hedrick.

BICKNELL, C.—This was an action by the appellee against the appellants to foreclose a mortgage of land, and to enjoin the appellants against impairing the mortgage security, by cutting down timber. Issues were joined on the complaint, answers and replies; the cause was tried by a jury. The appellants excepted to the refusal of the court to permit certain questions to be put to the appellant Edward Hedrick, a witness in his own behalf. The jury returned a verdict for the appellee; the appellants moved for a new trial, alleging that the court erred in refusing to permit the proposed questions; the motion was overruled, and judgment was rendered against the appellants for the foreclosure of the mortgage and for a perpetual injunction. The appeal comes up on the bill of exceptions only, on questions of law reserved under section 347 of the practice act, upon the refusal of the court to admit said proposed questions.

The error assigned is that the court erred in overruling the motion for a new trial. It was held, in *Starry v. Winning*, 7 Ind. 311, that the bill of exceptions, in such cases, “must contain, and must purport to contain, all the evidence relating to the point of exception.” The court said, that section 347, 2 R. S., p. 116, is modified by section 344, *id.*, p. 115; thus “the objection must be stated with so much of the evidence as is necessary to explain it.” “Nothing less will put the Supreme Court in a position to judge correctly of the point reserved.”

In *Mitchell v. Dibble*, 14 Ind. 526, it was held that, if improper admission of testimony be complained of, the bill of exceptions should distinctly present the points and the statement by the court of such facts as may have affected the decision. The court said: “The bill of exceptions is not so made as to distinctly present the points, and there is no statement of the court of such facts as may have existed rendering the admission of the evidence proper or improper.” The language of said section 347 is, “the court shall thereupon

The State v. Boss.

cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause only, and the statement of the court, as will enable the Supreme Court to apprehend the particular question involved.”

In the case now before us, the bill of exceptions does not contain, or purport to contain, any of the evidence given in the cause. In the absence of any evidence relating to the points of exception, we are bound to presume that the evidence, if present, would sustain the rulings of the court and justify the overruling of the motion for a new trial.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court be, and the same is hereby, in all things affirmed, at the costs of the appellants.

No. 8481.

THE STATE v. BOSS.

CRIMINAL LAW.—*Indictment.*—*Title.*—*Variance.*—*Repugnancy.*—Under the sixth clause of section 61. 2 R. S. 1876, p. 386, an indictment is not bad for repugnance, where the defendant is truly named in the body of the indictment, but another person is named in the title thereof.

From the Washington Circuit Court.

D. P. Baldwin, Attorney General, *F. L. Prow*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

N. B. Boss, for appellee.

WORDEN, J.—The following indictment was returned against the appellee in the court below, viz. :

The State v. Boss.

“STATE OF INDIANA, } In the Washington Circuit Court,
Washington County. } ss. October term, 1879.

“The State of Indiana v. William Fulk: Indictment No. 8.

“The grand jurors for the county of Washington and State of Indiana, upon their oath, present that Napoleon Boss, on the 12th day of October, 1879, at said county, did then and there unlawfully carry, concealed in his pocket and upon his person, a certain dangerous and deadly weapon, to wit, a pistol, he, the said Napoleon Boss, not being then and there a traveller, contrary,” etc.

The court quashed the indictment, and the State excepted. The indictment was good, unless the entitling of the cause as “The State of Indiana v. William Fulk” rendered it bad. The entitling of the cause embodied no fact found by the grand jury. What the grand jury found by the indictment was that Napoleon Boss was the person guilty of the offence charged. There is a repugnance between the title of the cause as to the party defendant and the body of the indictment in respect to the person charged; but we have the following statutory provision:

“No indictment or information may be quashed or set aside for any of the following defects: * * *

“*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged.” 2 R. S. 1876, p. 386, sec. 61.

Notwithstanding the repugnancy above mentioned, there is ample in the indictment to indicate that Napoleon Boss is the person charged with the offence. *Howard v. The State*, 67 Ind. 401.

We are of opinion that the court erred in quashing the indictment.

The judgment below is reversed, with costs, and the cause remanded for further proceedings.

Farman v. Chamberlain et al.

No. 7763.

FARMAN v. CHAMBERLAIN ET AL.

74	89
127	90
74	82
128	83
74	82
136	818
74	82
148	557

PLEADING.—Practice.—Demurrer.—A complaint good in part is sufficient on a demurrer to it as an entirety.

SAME.—Answer.—An answer which purports to answer the entire complaint, but answers only a part, is insufficient on demurrer.

COVERTURE.—A married woman has a right to recover for money paid by her at another's request, and her coverture is no defence to an action by her seeking such recovery.

HUSBAND AND WIFE.—Wife's Services.—A husband can make a valid gift of his wife's services to her, for which she can maintain an action.

SAME.—When Wife Competent Witness.—Where the wife is the owner in her own right of the cause of action, her husband is only a nominal plaintiff, and she is a competent witness under section 1 of the act of March 11th, 1867, 2 R. S. 1876, p. 132.

From the Marion Superior Court.

J. S. Harvey and *G. W. Galvin*, for appellant.

ELLIOTT, J.—The appellees were the plaintiffs below, and in their complaint alleged that the appellant was indebted to Frances Chamberlain, the wife of James Chamberlain, her co-appellee, for services rendered by said Frances, in caring for and nursing one Josephine Fisher, and for money paid out by said Frances Chamberlain, at appellant's request, in the sum of five hundred dollars.

Appellant urges that a demurrer which he addressed to the complaint ought to have been sustained. The argument is, that, as Frances Chamberlain was a married woman, her husband was the only party who could maintain an action for services rendered by her. It is sufficient to say of this argument, although other reasons for declaring it invalid might be assigned, that it leaves out of consideration the fact that the complaint was incontestably good so far as the cause of action stated rested upon the claim for money paid at the appellant's request. It needs neither authority nor argument to support the proposition, that a complaint good in part will successfully resist an attack made by a demurrer to it as an entirety.

Farman v. Chamberlain et al.

Appellant answered the coverture of Frances Chamberlain, the real party in interest. To this answer, the appellee Frances Chamberlain replied, that she was entitled to all the income or compensation accruing from her services, by gift thereof from her husband. To this reply the appellant unsuccessfully demurred.

There was no error in overruling the demurrer to the reply. The answer was bad, because it undertook to answer the entire complaint, and answered only a part. Coverture was no defence to that part of the complaint which sought a recovery for money paid out at the request of the appellant. A married woman has a right to recover money paid by her at another's request. Even if it were conceded that the reply was bad, still there was no available error in overruling the demurrer, because a bad reply was good enough for a bad answer.

The reply was good. A husband may make a valid gift of his wife's services to her, and the party against whom she seeks a recovery for such services can not successfully dispute her right to maintain the action. Schouler's Domestic Relations, 243; *Cooper v. Ham*, 49 Ind. 393.

Among the reasons assigned for a new trial is one based upon the ruling of the court permitting Mrs. Chamberlain to testify as a witness. The court did right. The wife was the owner in her own right of the cause of action; the husband was only a nominal plaintiff, and she was a competent witness under the statute in force at the time of the trial. *Farman v. Lauman*, 73 Ind. 568.

It is argued that the motion for a new trial ought to have been sustained because the verdict was contrary to the evidence. All we need say upon this point is, that the verdict is clearly right upon the evidence.

Judgment affirmed, at the costs of appellant.

Palmer v. Galbreath et al.

No. 8103.

PALMER v. GALBREATH ET AL.

REPLEVIN BAIL.—Execution.—Judgment.—Levy.—Justice of the Peace.—

Where the replevin bail upon a judgment rendered by a justice of the peace procures the issuance of an execution on such judgment, within the time allowed by law for the stay thereof, without the affidavit and notice required by section 94, 2 R. S. 1876, p. 635, such execution is unauthorized, and the constable may return it without making a levy.

SAME.—Right to Control Execution.—A replevin bail has no right to direct or control an execution issued on a judgment after the expiration of the stay of execution thereon, without having first paid off the judgment.

From the Kosciusko Circuit Court.

C. Clemans and *A. C. Clemans*, for appellant.

A. G. Wood and — *Brubaker*, for appellees.

FRANKLIN, C.—Appellees filed before a justice of the peace a complaint against appellant to have satisfaction entered of a judgment rendered before said justice for \$238.73, on confession, against one Henry Hays and in favor of said appellant, upon which said appellees had become replevin bail. The cause got into the circuit court by some means which are not shown by the record, where, on leave of the court, appellees filed an amended additional third paragraph to their complaint. Each paragraph of the complaint was separately demurred to. Demurrers overruled, and excepted to. No written answer was filed. Trial by jury. Verdict and judgment for appellees.

Among the errors assigned is the overruling of the separate demurrers to each paragraph of the complaint. We see no error in overruling the demurrers to the first and second paragraphs of the complaint.

The third paragraph of the complaint reads as follows: “And for a third amended and further cause of complaint the plaintiffs say that the defendant Osiah Palmer obtained judgment against Henry W. Hays, on the docket of J. W. Stinson, justice of the peace of Washington township, and

Palmer v. Galbreath *et al.*

that said plaintiffs became replevin bail thereon for said Hays ; that afterwards, to wit, on the 15th day of April, 1876, the said J. W. Stinson, justice of the peace as aforesaid, issued, at the request of plaintiffs, an execution against the property of the said Henry Hays, as principal, and said plaintiffs, as replevin bail, on said judgment, in favor of said defendant, and caused the same to be placed in the hands of Benjamin Wooden, the acting constable of said township ; that said Henry W. Hays had in his possession personal property, subject to levy and sale on execution, sufficient to fully pay and satisfy said execution ; that said plaintiffs, who were then and there replevin bail on said judgment, requested the said constable to levy on the property of said Henry Hays, the judgment debtor, and that they showed said constable property belonging to said Henry Hays, that was subject to execution, and requested him to levy on the said property. Plaintiffs further aver that the said constable, who then and there held said execution, refused and neglected to make said levy on said property of said execution defendant, but returned the same to said justice ; that said return was made at and by the request of said Palmer. Plaintiffs further aver that afterward said Henry W. Hays filed his petition in bankruptcy, and became insolvent ; that if said defendant Palmer had allowed said constable to have taken said property turned out by said plaintiffs on said execution to said constable, to be sold as directed, there would have been sufficient money made to fully pay and satisfy said execution. Wherefore plaintiffs demand judgment for satisfaction of said judgment, and for all other relief.”

The demurrer presents the question as to whether this paragraph states facts sufficient to constitute a cause of action. The 94th section of the justice of the peace act, 2 R. S. 1876, p. 635, reads as follows : “Any replevin bail desirous of being discharged from his liability, may make affidavit that he is apprehensive of being made liable thereon, if exe-

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cution be farther delayed ; and on the filing of such affidavit, the justice shall cause the defendant to be notified in writing, that unless he give other replevin bail, execution will issue thereon, and if such defendant shall not, within three days after service of such notice, give other bail, execution shall issue in the same manner as if the stay had expired.”

This paragraph does not state that the execution was issued within the time that the replevin bail had a right to have it issued, and does not allege that any affidavit had been filed previous to its issue ; neither does it show that the principal judgment defendant was notified to give new replevin bail. If this execution was issued within the time allowed for stay, without the necessary affidavit and notice, it was unauthorized, and the constable might return it without a levy. If it was issued after the time for stay had expired, the replevin bail had no right to direct or control it, without having first paid off the judgment. And there is nothing in the paragraph showing a satisfaction of the judgment, either by payment or a sufficient levy.

This paragraph is insufficient to authorize an order declaring the judgment satisfied. If appellees have any remedy growing out of the facts pleaded, it could be made to appear in an injunction proceeding, commenced in the circuit court.

We think the court erred in overruling the demurrer to the third paragraph of the complaint. And, as the cause must be reversed for this error, it is unnecessary to notice the other assignments of error. The questions may not again arise in the subsequent trial of the cause.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and is hereby, in all things reversed, at the costs of the appellees, and that the same be remanded to the court below, with instructions to sustain the demurrer to the third paragraph of the complaint, and for further proceedings.

Kennedy v. Howard.

No. 9118.

KENNEDY v. HOWARD.

74 87
e168 53

CRIMINAL LAW.—*Crime Committed by Convict while in Penitentiary.*—*Jurisdiction.*—*Sentence Adjudged.*—Where a prisoner, while undergoing imprisonment in the penitentiary for a term of years, commits a criminal offence, the circuit court of the county where such offence is committed has jurisdiction to try him therefor, and may adjudge that he be imprisoned for a term extending beyond the term for which he was already sentenced, or for life, or may adjudge that he suffer death. And, where the term of imprisonment adjudged is for life, it will commence on the day of conviction and sentence, and runs concurrently with the term of the previous sentence.

SAME.—*Term of Imprisonment.*—*Several Convictions.*—The courts of this State have no authority to adjudge, on several convictions, that one term of imprisonment shall commence at the expiration of another.

Appeal from the judgment of the Hon. Charles P. Ferguson, Judge of the 4th Judicial Circuit, in proceedings in *habeas corpus* in vacation in the county of Clark.

C. H. Test and *J. Coburn*, for appellant.

J. K. Marsh, for appellee.

WORDEN, J.—In November, 1871, the appellant, Kennedy, was convicted in the Shelby Circuit Court of the crime of assault and battery with intent to commit murder, and was adjudged to suffer imprisonment in the state-prison for the period of eight years. He was accordingly imprisoned in the state-prison south; and having served out the term specified, and the appellee, as the warden of the prison, refusing to discharge him, he instituted these proceedings, and asked to be discharged from custody.

The appellee made return to the writ, showing the ground on which he retained the appellant in custody in the said prison; and, on the hearing of the cause, the judge declined to discharge the appellant, but remanded him to the custody of the warden.

It appeared by the return of the appellee and the evidence adduced upon the hearing, that after the commitment of the

Kennedy v. Howard.

appellant for the term above mentioned, and before its expiration, the appellant was indicted for murder, in the Clark Circuit Court, perpetrated while he was thus under imprisonment, tried, convicted, and adjudged to suffer therefor imprisonment for life in the state-prison. Under the last mentioned conviction, the appellant was in the custody of the appellee as warden of the prison. The judgment in the last mentioned case was affirmed in this court. *Kennedy v. The State*, 66 Ind. 370.

It is contended by counsel for the appellant, that the Clark Circuit Court had no jurisdiction or power to try him for the offence thus committed in the penitentiary during the term for which he had been formerly sentenced, and while he was undergoing imprisonment.

We do not concur in this view of the question.

While the appellant was thus in prison he was as much amenable to the criminal laws of the State as if he had been out of prison. And the court had jurisdiction of the offence, it having been committed within the body of Clark county. It also had jurisdiction of the person of the defendant. It can not, as we think, be rightfully said, that while a person is undergoing imprisonment in the penitentiary, the proper court has no right or power to try him for an offence which he may commit while thus imprisoned. The appellant need not have been, and, so far as we can see from the evidence, was not, deprived of any of his legal rights in respect to the trial. He was brought into court for trial, and was subjected to no more inconvenience, so far as appears, than if he had been imprisoned in the jail of Clark county to answer to the charge.

Perhaps no punishment, short of death, could be inflicted for an offence committed by a prisoner in the penitentiary, that would be inconsistent with his continued imprisonment for the residue of the term for which he had been sentenced ;

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as imprisonment in the county jail. But such question is not involved here.

If the theory of the appellant is correct, that a prisoner in the state-prison can not be tried during the term for which he was sentenced, for any offence he may commit during that term, then one sentenced for life may commit murder at his pleasure without liability to punishment therefor by law. This evidently ought not to be, and in our opinion is not, the law. If a person undergoing a life sentence in the penitentiary commits murder, he may, as we think, be tried for it; and, while another life sentence would add nothing to the punishment already adjudged, he might be adjudged to suffer the extreme penalty of death. So where a prisoner for a term of years commits an offence, he may be tried for it and adjudged to suffer imprisonment for a term extending beyond the term for which he is already under sentence, or for life; or he may be adjudged to suffer death.

The courts of this State have no authority to adjudge, on several convictions, that one term of imprisonment shall commence to run at the expiration of another. "The term of service and imprisonment of every convict shall commence from the day of his conviction and sentence." 1 R. S. 1876, p. 646, sec. 6. The result is that where there are several convictions and several terms of imprisonment adjudged, the terms run concurrently. *Miller v. Allen*, 11 Ind. 389. The term of the appellant's imprisonment for life commenced on the day of his conviction and sentence, and ran concurrently with the term of his previous sentence. This view is in entire harmony with the case *Ex parte Meyers*, 44 Mo. 279, cited by counsel for the appellant. There Meyers had been sentenced to imprisonment in the penitentiary on two several convictions, for two several terms—the first for two years, and the second for three years. It was held that having served out the longest term, the terms having run concurrently, he was entitled to be discharged. Nor do we think

 Shafer v. The State.

the case of *The People, ex rel. Tweed, v. Liscomb*, 60 N. Y. 559, furnishes any authority for the position assumed by counsel for the appellant. There Tweed had been convicted on several counts of an indictment charging several misdemeanors, and the court sentenced him to twelve successive terms of imprisonment of one year each, and to pay twelve fines of \$250 each, the year's imprisonment and the fine of \$250 being the maximum punishment inflicted by the statute under which he was indicted. It was held that a judgment on one count exhausted the power of the court, and that the prisoner, having suffered one year's imprisonment and paid one fine, was entitled to be discharged.

We are of opinion that the decision of the judge below was right.

The judgment below is affirmed, with costs.

 No. 9290.

SHAFFER v. THE STATE.

CRIMINAL LAW.—Verdict.—Judgment.—Where, on a conviction for grand larceny, the verdict of the jury contains no express disqualification of the defendant for holding office, and the judgment follows the verdict, the defendant not having been shown to have suffered any injury thereby, such verdict is not void, and no error was committed in rendering judgment thereon. *Wilson v. The State*, 28 Ind. 393, distinguished.

SAME.—Indictment.—Practice.—Evidence.—An objection to an indictment, that the property charged to have been stolen is inaccurately described, is no cause for quashing the indictment, where the objection is not applicable to all the property named therein. The proper way to present such objection is to object to the admission of any evidence concerning the property improperly described.

From the Kosciusko Circuit Court.

74	90
140	90
74	90
144	659
74	90
148	285

Shafer v. The State.

L. W. Royse, for appellant.

D. P. Baldwin, Attorney General, and *J. D. Widaman*, Prosecuting Attorney, for the State.

WOODS, J. — Indictment for grand larceny; plea, not guilty. Trial by jury, which returned the following verdict, excepting the title of the cause and signature of the foreman, which are omitted, namely: “We, the jury, find the defendant, Jacob Shafer, guilty as he stands charged in the indictment, and assess his punishment, that he be imprisoned in the State’s prison for the term of two years, that he be fined in the sum of three dollars and disfranchised for the term of two years.”

The defendant objected to the discharge of the jury, but stated no grounds for the objection. The court overruled the objection and discharged the jury; to which ruling and action of the court the defendant excepted, and filed a written motion to be discharged from custody, upon the ground “That the court committed error of law in receiving the verdict upon which no judgment can be rendered, and discharging the jury on receipt of said verdict, over the objection and exception of the defendant.” This motion the court overruled; and the defendant excepted, and then filed a motion for a *venire de novo*, alleging reasons therefor: (1) That there is no verdict on which judgment can be rendered, and (2) that the verdict is imperfect, in not assessing the punishment required by law. This motion the court overruled, and rendered judgment in accordance with the terms of the verdict. Exceptions to all these rulings are saved by a proper bill of exceptions.

The objection which counsel for the appellant makes to this verdict is, that it contains no express disqualification of the defendant for holding any office of trust or profit, it being insisted that the verdict must conform strictly to the statute, which says that the accused, upon conviction,

Shafer v. The State.

“shall be fined not exceeding double the value of the goods stolen, be imprisoned in the state-prison, not less than two nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period ;” and, in support of his objection, counsel cites *Wilson v. The State*, 28 Ind. 393. The verdict in that case was, it seems, the same as in this, and the court held it defective, and that it did not authorize that part of the judgment which declared the prisoner incapable of holding office. In the case before us, the judgment did not go beyond the letter of the verdict, and is therefore clearly distinguishable from the case cited.

The only plausible argument which, it occurs to us, can be made in support of such an objection to a verdict as is now presented, must rest on the supposition or theory that the jury, in adjusting the different elements or kinds of punishment which they are required to inflict, will fix the amount of each kind with reference to the measure of the other kinds which they impose ; and so, if one kind is omitted, it may be presumed that a greater measure of another character was inflicted. Counsel has not made this argument in behalf of the appellant, but bases his appeal on the letter of the law, and makes no pretence that his client has suffered any supposable injury. It is evident he has not suffered injury. He was found guilty as charged, of grand larceny ; it is not shown or claimed that he was a minor ; the imprisonment, therefore, was for the shortest possible period ; the fine imposed is too small to cut any figure, and the disfranchisement did not extend beyond the term of imprisonment. The appellant has therefore suffered no conceivable harm. The court committed no error in discharging the jury, in refusing to discharge the defendant, in overruling the motion for a *venire de novo*, and in rendering judgment upon the verdict.

At the proper time the appellant made a motion to quash

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the indictment, which was overruled, and an exception saved. The point made upon the indictment is an alleged "inaccurate description of the property charged to have been stolen," which was described as "national bank currency notes." "We maintain," says counsel, "that there is no such currency in circulation."

The description of the stolen money, contained in the indictment, was as follows: "One twenty-dollar national currency bank note, of the value of twenty dollars; one twenty-dollar national bank currency note, of the value of twenty dollars; one ten-dollar national bank currency note, of the value of ten dollars; three five-dollar national bank currency notes, of the value of five dollars each; one one-dollar silver piece of the coinage of the United States, of the value of one dollar; one twenty-five cent silver piece of the coinage of the United States, of the value of twenty-five cents." The objection, if good, does not reach the silver coins, which are charged to have been stolen, and therefore constituted no cause for quashing the indictment. The proper way to have saved the question was to have objected to the admission of any evidence concerning the bank bills or notes.

We find no error in the record, and the judgment is affirmed, with costs.

No. 7600.

MORAL SCHOOL TOWNSHIP v. HARRISON ET AL.

PROMISSORY NOTE.—School Township.—Complaint.—A complaint upon a note of a township, averring that it was executed for an indebtedness against the school township, and showing that the articles for which it was given were "dissected maps of the United States," makes it sufficiently apparent that it was the intention of the parties to bind the school, and not the civil, township.

Moral School Township v. Harrison *et al.*

PLEADING.—Answer.—Demurrer.—Harmless Error.—Where all the evidence which might be given in support of paragraphs of answer is admissible under other paragraphs, demurrers are not improperly sustained to them.

CONSIGNMENT.—Railroad.—Delivery at Station.—Where maps had been purchased by a township trustee, their delivery at the railroad station, with notice to him, after the time agreed, vested their ownership in the school township, subject only to his right to refuse to receive them, for sufficient reason, and relieved the railroad company of any further obligation to the consignor.

RESCISSION OF CONTRACT.—Township Trustee.—Notice.—Where a trustee who has executed a note in the name of his school township, in advance of the delivery of maps purchased, desires to rescind the contract, on account of delay in performance, it is incumbent on him to notify the consignors of such intention, to return the maps, or do some other act disaffirming the contract.

From the Shelby Circuit Court.

O. J. Glessner and *E. S. Stilwell*, for appellant.

N. B. Berryman and *B. F. Love*, for appellees.

NIBLACK, J.—The complaint in this case averred, that on the 14th day of February, 1873, Joshua S. Deermin was the duly qualified and acting trustee of Moral school township, in Shelby county, and that, as an evidence of an existing indebtedness against, and for the purpose of binding, said township, the said Deermin, as such trustee, executed and delivered to the Higgins Bentwood School Furniture Company the promissory note of said township, as follows:

“STATE OF INDIANA, COUNTY OF SHELBY:

“TREASURER’S OFFICE, MORAL TOWNSHIP,
“\$185.00. February 14th, 1873.

“This is to certify that there is due from this township to Higgins Bentwood School Furniture Co. one hundred and eighty-five dollars for 10 sets Higgins Dissected Maps of U. S., and payable on or before the 13th day of June, 1874, with interest at the rate of ten per cent. per annum, from Sept. 1st, 1873. Payable at First National Bank at Shelbyville, Ind.

JOSHUA S. DEERMIN,
“Trustee of Moral Township.”

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That before maturity, to wit, on the 15th day of February, 1873, said Higgins Bentwood School Furniture Company, by an endorsement in writing, assigned said note to the plaintiffs, Alfred Harrison and John C. S. Harrison, which note remaining unpaid, judgment was demanded against the township.

A demurrer to the complaint, for want of sufficient facts, was overruled. The defendant answered:

1. In general denial.
2. That it was not indebted to the payee in any sum, and that hence Deermin had no authority to execute the note.
3. That the note was given without any consideration whatever.
4. That the note was executed without any consideration, of which the plaintiffs had notice at the time they purchased the same and took the assignment thereof.
5. That the note was not executed for any article or commodity necessary for educational purposes in the township, and was for that reason void.
6. That the maps for which the note was given were not necessary for educational purposes, and that consequently the township could not be required to pay for said maps.
7. That the note was executed in consideration of an agreement in writing, entered into by the payee, agreeing to deliver the sets of maps named in the note, at Brookfield station, in this State, at some time during the summer or fall of 1873; that said maps were never received by the township; of all which facts the plaintiffs had notice when they purchased the note.
8. That the note had been fraudulently transferred to the plaintiffs, for the purpose of cheating and defrauding the defendant, and that the payee of the note was still the owner thereof.

Demurrers were sustained to the second, fifth and sixth

Moral School Township v. Harrison *et al.*

paragraphs of the answer, and overruled as to the third, fourth, seventh and eighth paragraphs.

At the trial the plaintiffs obtained a verdict and judgment against the defendant for the amount of the note, with the interest which had accrued.

Error is assigned upon the overruling of the demurrer to the complaint, upon the sustaining of the demurrer to the second, fifth and sixth paragraphs of the answer, and upon the refusal of the court to grant a new trial.

It is claimed that the facts averred in the complaint made out a demand against Moral township as a civil, but not as a school organization, and that, upon that ground, the demurrer to the complaint ought to have been sustained.

The averment, however, that the note was executed for an indebtedness against the school township, taken in connection with the articles for which it purported to have been given, makes it sufficiently apparent that it was the intention of the parties to the note to bind the school, and not the civil township. *Carmichael v. Lawrence*, 47 Ind. 554; *Jackson School Township v. Hadley*, 59 Ind. 534.

The second, fifth and sixth paragraphs of the answer were all addressed to the consideration of the note, and each constituted an argumentative affirmation that the note was given without any good or valuable consideration. All the evidence, therefore, which might have been given in support of those paragraphs, was admissible under the third and fourth paragraphs of the answer. Under these circumstances the appellant was not substantially injured by the ruling of the court upon any one of the paragraphs of the answer to which a demurrer was sustained, conceding the abstract sufficiency of those paragraphs upon demurrer.

It was made to appear upon the trial, that sets of maps similar to those mentioned in the note reached Brookfield station, three or four hundred yards from where Deermine resided, on or about the 16th day of December, 1873; that

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a week or two afterwards the railroad agent at that station informed Deermin, who was still township trustee, that the maps were at the dépôt for him, which was the first notice that Deermin had received that the maps had been shipped to him; that soon afterwards Deermin went to the depot and looked at the boxes containing the maps, but refused to receive the maps, or to pay freight upon them, telling the agent that the maps had not come according to contract, and that he, the agent, could do as he pleased with them; that the maps had continued to remain at the depot, in unopened boxes, until the time of the trial. It was further made to appear that the Higgins Bentwood School Furniture Company had agreed to deliver the maps during the summer or fall of 1873.

The court, upon its own motion, gave the jury the following instruction: "It is insisted by defendant's counsel that, by the terms of the contract, the maps were to be delivered at Brookfield in the summer or fall of 1873, and, the plaintiff's assignors not having delivered the maps within the time specified in the contract, the collection of the note can not be enforced. If the maps were shipped to Brookfield by plaintiff's assignors on the 17th day of December, 1873, and Mr. Deermin, the then acting trustee of the township, afterwards had notice of the fact that the maps had been consigned to him as such trustee, and had arrived at Brookfield station, and, in pursuance of such notice, he examined such maps in the depot, after notice of their arrival from the railroad agent, and had no other reason for not receiving them than the reason that they had not been shipped in time, then it was the duty of Mr. Deermin to notify the consignors that the maps were held subject to their order, return the maps to them, or do some act disaffirming the contract, or the defendant is liable, notwithstanding the maps were not shipped in the summer or fall of 1873."

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The defendant excepted to the giving of this instruction, and asked the court to instruct the jury that if Deermin received no other notice of the shipment of the maps, or of their arrival at Brookfield station, than the notification of the railroad agent, and that if Deermin, at the time, or within a reasonable time thereafter, notified the railroad agent that he would not accept the maps, and that the railroad company must look to the shippers for their freight charges, that was sufficient notice to the Higgins Bentwood School Furniture Company of the refusal of the defendant to accept the maps, and of the rescission of the contract with the furniture company, but the court refused to so instruct the jury.

The appellant contends that the court erred, both in instructing and refusing to instruct the jury, as above set forth, upon the ground that, under the circumstances as disclosed by the evidence, the railroad agent became, also, the agent of the furniture company for the delivery of the maps to Deermin, and that consequently notice to the railroad agent of the non-acceptance of the maps was notice to the furniture company; but we are unable to agree to the construction of the evidence thus contended for by the appellant. The delivery of the maps at Brookfield station vested their ownership in the school township, subject only to the right of Deermin as the trustee to refuse to receive them, on account of the delay in their delivery, or for some other sufficient reason, and relieved the railroad company of any further obligation to the plaintiff, arising out of the shipment of the maps. The duties which devolved upon the railroad agent concerning the maps were only such as his obligation to the railroad company required him to perform. Those duties did not make him, in any sense, the representative of the furniture company in any matter connected with the acceptance or non-acceptance of the maps by the appellant. We consequently see no substantial objection to the instruc-

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tion given by the court, and no error in the refusal of the court to give the instruction asked for by the appellant.

Deermin having executed the note of the school township, in advance of the delivery of the maps, it was incumbent on him to give notice to the furniture company, if he desired to rescind his contract with them on account of their delay in the performance of the contract on their part.

The authorities mainly relied on by the appellant have reference to contracts by which goods are to be paid for on delivery, or to agreements which are wholly executory, and not cases like this, in which the contract of sale has been in part executed.

The judgment is affirmed, with costs.

74	99
128	00
74	99
151	145
74	99
158	555

No. 9531.

HEANLEY ET AL. v. THE STATE.

CRIMINAL LAW.—*Affidavit and Information.*—*Constitutional Law.*—The act approved March 29th, 1879, Acts 1879, p. 143, “in relation to prosecutions of felonies by affidavit and information, in certain cases,” is general and of uniform operation throughout the State, and is constitutional.

SAME.—*Defendant's Personal Right.*—*Jurisdiction.*—The provision in section 2, that “any person charged with a felony shall have the right to demand that he be prosecuted by affidavit and information without delay,” gives a personal right which he may exercise if he elect so to do, but the court's jurisdiction does not depend upon his exercise or non-exercise thereof.

From the Madison Circuit Court.

C. D. Thompson, for appellants.

D. P. Baldwin, Attorney General, and *W. A. Kittinger*, for the State.

Heanley et al. v. The State.

Howe, C. J.—This was a prosecution for rape by affidavit and information, against the appellants, Thomas Heanley and John Noonan, and one Robert Shinn. The appellants requested to be tried jointly, and on arraignment they each pleaded to the affidavit and information, that they were not guilty as therein charged. The trial of the issues joined, by a jury, resulted in a verdict, finding them guilty as charged in the affidavit and information, and assessing their punishment at imprisonment in the state-prison for the term of three years and six months; and judgment was rendered on the verdict.

A number of supposed errors have been assigned by the appellants on the record of this cause, all of which relate to the alleged insufficiency of the affidavit and information. No objections were taken in any manner to any of the proceedings below, and the objections to the sufficiency of the affidavit and information are presented for the first time in this court. The first point made by the appellants' counsel, in argument, is that the act entitled "An act in relation to prosecutions of felonies by affidavit and information, in certain cases," approved March 29th, 1879, is unconstitutional and void. It is claimed by counsel, that the act in question "is in direct conflict with sections twenty-two and twenty-three of article four of the constitution of the State and is, therefore, illegal and void." In said section 22, of article 4, it is provided that "The General Assembly shall not pass local or special laws, * * * * * for the punishment of crimes and misdemeanors," nor for "regulating the practice in courts of justice," etc. In said section 23, of said article 4, it is declared that "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

After quoting these constitutional provisions, the appellants' counsel says interrogatively: "Now, is the act of 1879,

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above cited, general and of uniform operation throughout the State?" We are of the opinion, that this question must be answered in the affirmative. If, as counsel claims, there is any inconsistency between the provisions of the act of 1879, and those of the criminal code of June 17th, 1852, the only effect of such inconsistency would be, that that far forth the provisions of the criminal code would be repealed by those of the act of 1879, and the latter would be the law in force. The act of March 29th, 1879, is not, as we think, in conflict with any of the provisions of the constitution of this State. The General Assembly had full power, therefore, to enact the statute under consideration; and, whatever may be thought of the policy or wisdom of the act, its constitutionality cannot be fairly questioned or doubted. The modern view, taken by this court, of the effect of said sections 22 and 23, of article 4, of the constitution of this State, upon the statutes enacted by the General Assembly, differs very widely from the view first taken. Thus, in *Hanlon v. The Board, etc., of Floyd Co.*, 53 Ind. 123, this court said: "But, in our opinion, the section is neither local nor special, within the true sense and meaning of the constitution; but, on the contrary, it is general and of uniform operation. It operates uniformly and alike, in all parts of the State, under like facts." *The State, ex rel., v. Reitz*, 62 Ind. 159; *McLaughlin v. The Citizens, etc., Association*, 62 Ind. 264. So, also, it must be said, we think, that the above entitled act, of March 29th, 1879, is general and of uniform operation throughout the State.

But the appellants' counsel also insists that the affidavit and information are bad, because they do not, nor does either of them, state all of the facts necessary to give the trial court jurisdiction of the offence and of the persons of the appellants, under the provisions of the above entitled act of March 29th, 1879. In section 1 of said act, it is provided, "That felonies may be prosecuted in the circuit and

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criminal courts by affidavit and information in the following cases :

“*First.* When any person is in custody on a charge of felony, and no grand jury is in session ;

“*Second.* When an indictment has been found by the grand jury, and has been quashed ;

“*Third.* When a cause has been appealed to the supreme court, and reversed on account of defects in the indictment.”
Acts 1879, p. 143.

In this case, it was charged both in the affidavit and information, that “the said Thomas Heanley, John Noonan and Robert Shinn are now in the custody of the sheriff of Madison county, Indiana, to answer said charge, and the grand jury of said county is not now in session.” It would seem, that these allegations brought this cause fairly within the *first* case or class of cases, mentioned in said section 1 of the statute ; and this, we think, was a sufficient showing of the necessary jurisdictional facts. But, in section 2 of the same act, it is provided that “any person charged with a felony shall have the right to demand that he be prosecuted by affidavit and information without delay, and if the prosecuting attorney fails to prosecute as provided for in this act, the party so charged shall be discharged from custody.” Acts 1879, p. 144. It is claimed by the appellants’ counsel, as we understand his argument, that this section 2 of the act is in the nature of a limitation on the provisions, above quoted, of section 1 of the same act ; and that, therefore, it became necessary to charge as a jurisdictional fact, in the affidavit and information, in addition to those jurisdictional facts already mentioned therein, that the appellants demanded that they should be prosecuted by affidavit and information, without delay. In other words, counsel claims that, in none of the cases provided for in the 1st section of the act, can a defendant be prosecuted by affidavit and information, unless he shall demand to be so tried ; and that, therefore, the fact

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of such a demand by the defendant is a jurisdictional fact, which must be charged in both the affidavit and information, in order to show the court's jurisdiction both of the alleged felony and of the person of the supposed felon.

It seems clear to us, however, that this construction of the statute is in direct conflict with the manifest intention of the Legislature in its enactment, and it does not meet with our approval. In our opinion, the right of the defendant, under said section 2 of the act, is a personal right which he may exercise, if he elect so to do, in order to secure a speedy trial of his case; but it cannot be said, we think, that the court's jurisdiction, either of his person, or of the offense wherewith he may be charged, depends in any manner upon his exercise or non-exercise of such personal right.

We have found no error in the record of this cause, which would authorize a reversal of the judgment below.

The judgment is affirmed, at the appellants' costs.

No. 8520.

THE STATE v. MORIARTY.

CRIMINAL LAW.—*Indictment.*—*Intoxication.*—*Public Place.*—Under section 11 of the act of March 17th, 1875, 1 R. S. 1876, p. 872, prescribing a penalty for intoxication in certain cases, an indictment alleging that the defendant was found intoxicated “in a public street, highway and sidewalk,” charges that the offence was committed in a public place.

SAME.—*Highway.*—*Case Overruled.*—A public highway is a public place. *Williams v. The State*, 64 Ind. 553, overruled.

SAME.—*Street.*—A street is a public highway, and *prima facie* a public street is a public place.

From the Hendricks Circuit Court.

74	103
141	11
74	103
107	521

The State v. Moriarty.

D. P. Baldwin, Attorney General, *R. B. Blake*, Prosecuting Attorney, and *E. G. Hogate*, for the State.

ELLIOTT, J.—The indictment preferred against the appellee charges that “Dennis Moriarty, being then and there a person of sound mind, was then and there found in a public street, highway and sidewalk, in Hendricks county, Indiana, in an unlawful state of intoxication.” This indictment was quashed upon motion of the appellee. The ground upon which the motion to quash was sustained was, as we gather from the record, that the indictment did not charge that the offence was committed in a public place. The ruling of the court was based upon *Williams v. The State*, 64 Ind. 553, wherein it was held that, in an indictment for notorious lewdness, it was not sufficient to allege that the unlawful act took place in a public highway. In the case of *The State v. Wagoner*, 52 Ind. 481, a different doctrine was declared, and it was held that a public highway is a public place. The former case is not sustained by authority, while the latter is well supported.

We think that the case of *Williams v. The State* asserts an erroneous doctrine, and it is, therefore, overruled.

Even if the case of *Williams v. The State* should be held to declare the correct rule, we should still be bound to hold the present indictment sufficient. It is charged that the offence was committed “in a public street, highway and sidewalk.” A street is, it is true, a highway, but all highways are not streets. *Common Council, etc., v. Croas*, 7 Ind. 9. A street is not only a public highway, over and upon which all the citizens of the land have a right to pass and repass at pleasure, but it is a public highway of a city, town or village. There can be no reasonable presumption that there are secret or secluded places in streets. On the contrary, the presumption is that streets are public thoroughfares, open and free in every part to the public. It is the duty of

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the municipal authorities to keep them reasonably safe for travel. It is not sufficient to make part of a street safe for travel; the whole street must be made so. This consideration would, of itself, preclude the presumption that there may be secluded places in public streets.

Prima facie a public street is a public place. In one case it was said, "A street is *per se* public." *Carwile v. The State*, 35 Ala. 392; *McCauley v. The State*, 26 Ala. 135.

The term "street" does not mean private ways, nor does it apply to roads or ways owned by private corporations. *Wilson v. Allegheny City*, 79 Pa. St. 272; *Quinn v. The City of Paterson*, 27 N. J. L. 35.

The indictment, in charging that the offence was committed in a public street, shows at least a *prima facie* case. The State was not bound to anticipate defences, and negative their existence. If there existed any facts stripping a public street of its ordinary character, they should be shown by way of defence.

The court erred in sustaining the motion to quash.
Judgment reversed.

No. 9527.

THE STATE v. MADDUX.

CRIMINAL LAW.—Indictment.—Exceptions in Statute.—Exceptions to offences created by statute, not contained in the enacting clause or in the definition of the offences, but in a subsequent clause or statute, are matters of defence, and need not be negatived, either in the indictment or by the evidence.

SAME.—Drawing Dangerous Weapons.—It is not necessary, in an indictment under the act of March 13th, 1875, 2 R. S. 1876, p. 459, for drawing a dangerous weapon, to negative the exception contained in the proviso to such act.

From the Blackford Circuit Court.

74 105
124 170
124 383

74 105
151 249

74 105
155 696

74 105
168 114

74 105
1171 58

The State v. Maddox.

D. P. Baldwin, Attorney General, *C. W. Watkins*, Prosecuting Attorney, and *J. Noonan*, for the State.

Howk, C. J.—On the appellee's motion the indictment against him in this case was quashed, and to this decision the State excepted and has appealed therefrom to this court. The only question for our decision, therefore, is this: Did the trial court err in quashing the indictment?

Omitting introductory and formal matters, the indictment charged, in substance, that "John C. Maddox, late of said county, on the 1st day of November, A. D. 1880, at said county and State aforesaid, did then and there unlawfully draw a certain dangerous and deadly weapon, to wit, a pistol, commonly called a revolver, upon the person of one James Kingsbury, contrary to the form of the statute," etc.

It is manifest, that it was intended and attempted, in and by this indictment, to charge the appellant with the commission of a misdemeanor, which is defined and its penalty prescribed in section 1 of "An act defining certain misdemeanors, and prescribing penalties therefor," approved March 13th, 1875. Omitting the enacting clause, this section reads as follows:

"That if any person shall draw or threaten to use any pistol, dirk, knife, slung-shot, or any other deadly or dangerous weapon upon any other person, he shall be deemed guilty of a misdemeanor, and, upon conviction therefor, shall be fined in any sum not less than one nor more than five hundred dollars, to which may be added imprisonment in the county jail not to exceed six months: *Provided*, that the provisions of this act shall not apply to persons drawing or threatening to use such dangerous or deadly weapons in defence of his person or property, or in defence of those entitled to his protection by law." 2 R. S. 1876, p. 459.

The appellee has not favored this court with any argument in support of the decision of the circuit court, in his favor:

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and therefore we have been wholly dependent upon the well-considered brief of the appellant's counsel, for such information as we have in regard to the grounds of that decision.

We learn from the brief of the attorneys of the State, that the indictment in this case was probably quashed upon the ground that it did not contain an averment negating the exception in the proviso, to the effect that the appellee did not draw his pistol "in defence of his person or property, or in defence of those entitled to his protection by law." The question for our decision, therefore, is this: Was it necessary to the sufficiency or validity of the indictment in this case, that it should have negated the exception contained in the proviso, and not in the body of the act? We are of the opinion that this question must be answered in the negative. The misdemeanor, with the commission of which the appellant is charged in the indictment, is clearly and fully defined in the body of the section above quoted; while the matter stated in the proviso forms no part of the definition of the offence, but, if it exists, constitutes purely and simply a good and complete defence to any prosecution for such offence. The exception, it will be seen, is not embraced in the enacting clause, declaring and defining the offence; but it is found in a subsequent clause or proviso of the statute. In *Russell v. The State*, 50 Ind. 174, this court said: "The law in relation to exceptions in a statute is, that if the exception be contained in a subsequent clause or statute, it is a matter of defence, and need not be negated in the indictment." This, we understand, is the settled rule of law on the subject now under consideration. Thus, in Archbold's *Crim. Prac. & Plead.*, 8th ed., p. 361, it is said: "But where an offence is created by statute, and an exception is made, either by another statute or by another and substantive clause of the same statute, it is not necessary for the prosecutor, either in the indictment or by evidence, to show that the defendant does not come within the

McClure *et al.* v. McClure.

exception ; but it is for the defendant to prove the affirmative, and which he may do under the plea of not guilty.”

For the reasons given, the court clearly erred, as it seems to us, in quashing the indictment in this case.

The judgment is reversed, at the appellee’s costs, and the cause is remanded, with instructions to overrule the motion to quash the indictment, and for further proceedings not inconsistent with this opinion.

No. 8570.

McCLURE ET AL. v. McCLURE.

INTERROGATORIES.—*Conflict of Answers with General Verdict.*—Where there is a direct and irreconcilable conflict between the general verdict and the answers to interrogatories, the latter will prevail against the former.

SAME.—*When Single Answer to Interrogatories will Prevail Against General Verdict.*—Where interrogatories cover the whole case, and taken together sustain the general verdict, parties can not single out one of a series of answers and ask judgment upon that alone as against the general verdict, unless such answer is upon a vital point and distinct from and independent of other answers, and so in conflict with the general verdict as not to be reconcilable with it upon any reasonable hypothesis consistent with the issues.

INFANCY.—*Contract.*—*Ratification.*—Where a minor, in conjunction with a person of full age, retains possession of leased premises, under a contract therefor, ten months after attaining his majority, he thereby ratifies such contract.

SAME.—*Wrongful Detention.*—Infancy is not a defence to an action for the wrongful detention of property.

LANDLORD AND TENANT.—*Notice to Quit.*—*Evidence.*—In an action to recover the possession of real estate, where the evidence shows a tenancy for a time certain, no notice to quit is required.

From the Dearborn Circuit Court.

W. S. Holman and *W. H. Bainbridge*, for appellants.

O. B. Liddell, for appellee.

McClure *et al.* v. McClure.

ELLIOTT, J.—The appellee recovered judgment against appellants for the possession of real estate and damages for its detention. Appellant Frank McClure asks a reversal as to himself upon two grounds, which we will consider in the order in which they are discussed by counsel.

One of these grounds is, that upon the answers to interrogatories he was entitled to a judgment, notwithstanding the general verdict against him and his co-appellant, and that the court did wrong in overruling his motion for judgment. It is only in cases where there is a direct and irreconcilable conflict between the general verdict and the answers to interrogatories that the latter will prevail against the former. There is no such conflict here. Upon the contrary, taking, as must be done, all the answers together, they lend strong and full support to the general verdict. Where interrogatories cover the whole case, and taken together sustain the general verdict, parties can not single out one of a series of answers, and ask judgment upon that alone. Of course, if the answer is upon a vital point, and is distinct from and independent of other answers, it would be otherwise, provided always, that the conflict between it and the general verdict can not be reconciled upon any reasonable hypothesis consistent with the issues.

Another ground relied upon, and which is presented by Frank McClure's motion for a new trial, is that he was not of age when the premises were leased to him and his co-appellant. The original lease was a written one, and was executed in January, 1877. The second was a verbal one, and was entered into in the spring of 1878. Upon the trial, which took place on the 30th day of December, 1879, the said appellant testified that he was "twenty-two years old last May," and this would make him of full age in May, 1878. He, in conjunction with his co-appellant, retained possession for at least ten months after this date, and thereby ratified the original contract. There was not only no disaffirmance, but there

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were such acts as affirmatively indicated an intention to adopt the contract as it was originally executed. Infancy would not constitute a defence to the charge made in the complaint, that the appellant Frank McClure, in conjunction with his co-appellant, wrongfully detained possession of the demised premises from the appellee, and for such tortious detention, conceding the said appellant's infancy, the appellee was entitled to some damages, and we can not say, from the evidence, that the amount assessed by the jury was excessive.

Both the appellants joined in a motion for a new trial, and a reversal as to both is asked upon the ground that this motion was wrongly overruled. In support of this position it is urged that the evidence shows a tenancy from year to year, and that no notice to quit was ever properly given. We have carefully examined the evidence, and are satisfied that it clearly shows a tenancy for a time certain, and therefore no notice was required.

Judgment affirmed, at costs of appellants.

No. 7462.

ROBINSON v. SNYDER ET AL.

PRACTICE.—Harmless Error.—No available error is committed in striking out an answer, where the matters therein pleaded are admissible under the general denial already pleaded.

SAME.—Exception to Special Finding.—Motion for New Trial.—Case Explained.—An exception to a conclusion of law does not preclude a motion for a new trial on the ground that the special finding is not sustained by the evidence. *Cruzan v. Smith*, 41 Ind. 288, explained.

SAME.—Effect of Exception to Special Finding.—The effect of an exception to a special finding is to admit, for the purpose of the exception, the truth of the facts found, but the admission is not conclusive.

JOINT OBLIGORS.—Judgment Against One.—As a general rule a judgment against one of several joint obligors releases the others.

74	110
135	611
74	110
138	130
139	184
74	110
141	545
74	110
150	101

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From the Whitley Circuit Court.

C. Clemans and *A. C. Clemans*, for appellant.

T. R. Marshall and *W. F. McNagny*, for appellees.

ELLIOTT, J. — Seth F. Robinson, Elisha Hilliard and Ephraim Hilliard were partners, and this action was instituted against them upon a promissory note, executed in the firm name adopted by the partnership.

Judgment was rendered against Seth F. Robinson alone, who now prosecutes this appeal.

A point is made upon the ruling of the court striking out an answer filed by the appellant, but, as the matters specially pleaded were admissible under the general denial, which was already in, no available error was committed.

The second question which the appeal presents is the correctness of the conclusions of law, stated by the court, upon the facts set forth in the special finding. The finding is as follows :

“The defendants, on the 28th day of December, 1874, made the note sued on payable to the plaintiffs ; the same is due, and attorney’s fees for the collection of the same are worth \$15. Heretofore, on the 22d day of April, 1878, the said note was left with Jackson Sadler, a justice of the peace of Whitley county, to be sued upon, and he issued a summons thereon, returnable on the 27th day of April, 1878. The summons was duly returned, having been duly served on Robinson and Elisha Hilliard, and not found as to Ephraim Hilliard ; whereupon judgment was rendered by the said justice of the peace against Seth F. Robinson and Elisha Hilliard on said note for the sum of \$47, all in due form of law, and no further action was taken as to Ephraim Hilliard.

“On the 2d day of May, 1878, Seth F. Robinson made, before the justice, a motion for a new trial of the cause; and by the justice a new trial was granted, and the same was set for hearing on the 11th day of May, 1878, and sub-

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sequently the case was continued until the 18th day of May, 1878, and upon that day the plaintiffs appeared and dismissed the action, and judgment was rendered against them for costs. That the justice, in granting such new trial, at the time wrote out on his docket, as expressive of his judicial decision, 'And a new trial is hereby granted to him,' and then, with other words expressing his action, signed the docket on the 11th day of May, 1878. The justice, upon further consideration, wrote in his record, following the foregoing words: 'And the above judgment is set aside.'

"Subsequently the plaintiffs, on the 18th day of May, 1878, brought suit before the same justice, on the same note, and service of summons was had on Robinson and Elisha Hilliard, and no service as to Ephraim, and judgment on the note rendered against Robinson and Elisha Hilliard. From that judgment Robinson appealed to this court, and upon the issue made the cause is now before this court for trial. There being no service on Ephraim, and plaintiffs now dismiss as to Elisha Hilliard."

The court stated, upon the facts found, conclusions of law as follows: "From the foregoing, the court states, as conclusions of law, that the defendant Seth F. Robinson is liable to pay the plaintiffs \$64.45 on the note sued upon, which may be recovered in this suit. And the court further finds, that it be decreed, as against the plaintiff, that the judgment rendered before Jackson Sadler, Esquire, against the defendant Robinson be vacated and set aside, and the plaintiff barred from proceeding in any way as against Robinson, to enforce or collect said judgment."

The appellant excepted to the conclusions of law, stating his exceptions in general terms.

If the judgment rendered by the justice of the peace, on the 27th day of April, 1878, against both Robinson and Hilliard, was by the court deemed in force as against the latter, then the conclusions of law were clearly erroneous. It is

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settled that a judgment against one of several joint obligors discharges the others, except in cases where the statute expressly provides otherwise. *Kennard v. Carter*, 64 Ind. 31; *Nicklaus v. Roach*, 3 Ind. 78; *Holman v. Langtree*, 40 Ind. 349; *Erwin v. Scotten*, 40 Ind. 389; *Mullendore v. Silvers*, 34 Ind. 98. The inference from the language used by the court, in the special finding and conclusions of law, is, that the court regarded the judgment of April 27th, 1878, as in full force against Hilliard; and, if this is so, then the judgment against Robinson was erroneous. If we were clear that it is our duty to construe the findings and conclusions as declaring that the judgment of April 27th, 1878, was in force against Robinson's co-obligor, then we should be inclined to enter judgment for appellant on the special finding, but this we prefer not to do.

It is earnestly insisted that the motion for a new trial ought to have been sustained because the finding and judgment are contrary to the evidence.

An important question of practice requires consideration before discussing the principal question which counsel argue. The appellant's exception to the conclusions of law, it is said, concludes him from questioning the correctness of the finding of facts. We think otherwise. A party who excepts to the conclusions of law does not conclude himself from controverting the facts stated in the special finding. He admits their truth for the purposes of his exceptions, just as one who demurs to a pleading admits the facts stated. When the exception in the one case, or the demurrer in the other, is disposed of, the party is at liberty to controvert the statements made in the finding or pleading excepted or demurred to. When the exception is overruled, the party may then, by his motion for a new trial, present the question of the correctness of the finding of facts.

The case of *Cruzan v. Smith*, 41 Ind. 288, is not, when correctly understood, in conflict with the doctrine we have here

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declared. It is true that the court there said, "When a party excepts to the decision of the court, he admits that the facts are correctly and fully found, but says that the court erred in applying the law to the facts found to exist." This statement was correct as applied to the question then under consideration, for a party does by his exception admit the correctness of the finding of facts, but the admission is not a conclusive one. All that was meant in the case referred to is that the exception was an admission for the purpose of the exceptions. That we place a correct construction upon the holding in *Cruzan v. Smith*, is shown by the fact that the court there quoted with approval from the case of *Schmitz v. Lauferty*, 29 Ind. 400, the following language: "But if the 'decision is not sustained by sufficient evidence, or is contrary to law,' then the case is within the sixth specification of section 352 of the code, 2 G. & H. 212, and a motion for a new trial is proper."

We have looked through the evidence, and are satisfied that, upon one or more material points, the finding is opposed by uncontradicted evidence. There was in truth, no conflict of evidence. The only possible question is as to the effect to be given the documentary evidence introduced by the parties.

We think justice can be best done by reversing, and remanding the cause for a new trial; and we therefore reverse the judgment, at costs of the appellees, and remand the cause with instructions to sustain appellant's motion for a new trial.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

Long v. Williams.

No. 7703.

LONG v. WILLIAMS.

PRACTICE.—Harmless Error.—Cross Complaint.—Demurrer.—Where there is no substantial difference between the question presented in two paragraphs of a cross complaint, it is harmless error to sustain a demurrer to one of them.

SAME.—Special Finding.—Where a fact is not referred to in the special finding, no question is reserved in regard thereto by an exception to the conclusions of law from the facts found.

CONVEYANCE.—Disaffirmance.—Voidable Deed.—A voidable deed may be disaffirmed by entry on the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act, declaratory of an intention to disaffirm.

SAME.—Act of Disaffirmance.—It is the act of disaffirming which destroys a voidable deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made.

SAME.—Possession Not Necessary to Disaffirm.—It is not necessary that the grantor in a voidable deed should be in a position to recover the possession of the land conveyed, when the disaffirmance of the deed is made.

SAME.—Insufficient Excuse for Failure to Disaffirm.—The possession of real estate by a widow, under right of dower, is no excuse for the failure of a minor heir, to whom the fee belongs, to disaffirm a deed made thereto within a reasonable time after arriving at full age.

From the Shelby Circuit Court.

B. F. Love, for appellant.

A. Major, S. Major and L. J. Hackney, for appellee.

NIBLACK, J.—This was an action for partition, in which John Williams, the appellee, was plaintiff, and Nancy Long the appellant, and a considerable number of others, nearly all lineal descendants of one John White, deceased, were defendants. The complaint alleged that John White died intestate, in 1838, seized, amongst other tracts, of an eighty-acre tract of land, in Shelby county, the tract of which partition was demanded, and leaving a widow and six children; that the tract in controversy was afterwards assigned to the widow during her life as and for her dower interest in the lands of her said late husband; that, in 1848, the plaintiff had in-

74	115
127	444
74	115
128	354
74	115
132	484
133	426
74	115
135	593
74	115
139	75
74	115
145	679
74	115
154	373
74	115
158	627

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termarried with the widow ; that, on the 11th day of January, 1851, the plaintiff had purchased of the said Nancy Long, who was one of the children of the said John White, and was then the wife of one Abram Hill, and two other children of the said White, their interest in said eighty-acre tract of land ; that the widow, with whom the plaintiff had so intermarried, had died intestate in 1875 ; that the plaintiff had inherited from her one thirty-sixth part of said tract of land, he thus becoming the owner in the aggregate of nineteen thirty-sixth parts thereof. Nancy Long filed a cross complaint, in two paragraphs, setting up title to seven thirty-sixths of the land in dispute. In both paragraphs she set out the deed, with the acknowledgments attached thereto, which she and others had executed to the plaintiff on the 11th day of January, 1851, averring that at the time of its execution she was a minor and a married woman, under eighteen years of age, and that she had since disaffirmed said deed. The only substantial difference between the two paragraphs was, the first averred a disaffirmance in 1877, and the second a disaffirmance in 1860. A demurrer was sustained to the first paragraph of the cross complaint, and, issue being joined, the court made a special finding of the facts established by the evidence.

The facts as found by the court, and the conclusions of law drawn from them, so far as any question is made by this appeal, were as follows : That on the 4th day of December, 1838, John White died intestate, leaving Margaret White as his widow, and Nancy White, now Nancy Long, Elizabeth White, afterwards Elizabeth Engler, now deceased, Sarah White, afterwards Sarah Wallace, now also deceased, Phebe White, also since deceased, Joseph White, also now dead, and William White, who has also since died, as his children, surviving him ; that the said John White died seized, amongst other lands, of the eighty-acre tract described in the complaint ; that dower in the lands of her late husband was as-

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signed to the said Margaret, upon and so as to include said tract; that in the year 1848 the said Margaret intermarried with and became the wife of the plaintiff; that on the 11th day of January, 1851, the defendant Nancy Long, then Nancy Hill, together with her husband, Abram Hill, and Joseph White and wife, and William White and wife, executed and delivered to the plaintiff a deed of conveyance conveying to him the respective interests of the said Nancy, Joseph and William in the land in suit; that at the time of the execution of said deed the said Nancy was a married woman, and under eighteen years of age; that she did not arrive at the age of twenty-one years until the 11th of December, 1854; that the said Nancy did not, at any time or in any manner, ever disaffirm her said deed to the plaintiff, or declare to him her desire or intention not to be bound by the same, because of her minority when she executed said deed, or for any other cause, previous to the filing of her cross complaint; that afterwards the said Phebe White died intestate, without having ever been married, leaving her mother and brothers and sisters as her only heirs at law, surviving her; that, on the 6th day of August, 1875, the said Margaret, being still the wife of the plaintiff, died intestate.

Upon these facts, the court came to the conclusion that, at the death of John White, each of his children became entitled to one undivided sixth part of the land designated in the complaint, subject to the life-estate of their mother therein; that the plaintiff became the owner of the undivided interests of the said Nancy, Joseph and William in said land by their said deed of the 11th day of January, 1851, to him; that said deed, as to the said Nancy, was voidable, and might have been disaffirmed by her within a reasonable time after her arrival at the age of twenty-one years; that the dower interest of her mother in the land afforded no sufficient excuse for her delay in disaffirming her deed, within such reasonable time after arriving at full age; that, having failed

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for more than twenty years after reaching her majority to disaffirm her deed, it was then too late for her to exercise that right; that, by the death of the said Phebe White, the said Margaret inherited one-half of her interest in, equal to one-twelfth of, said land, one-third of which one-twelfth went to the plaintiff at the death of the said Margaret; that, by reason of the premises, the plaintiff had become the owner of nineteen thirty-sixths of the land, and was entitled to have partition of the same; that, as one of the heirs of her sister Phebe, the said Nancy had inherited a small interest in the land subsequent to the execution of her deed to the plaintiff, and that, by her mother's death, she afterward became entitled to another small interest in the estate which her mother had inherited from the said Phebe.

The court came to further conclusions, upon other facts found by it, as to the interests which the other defendants had acquired in the land, to all of which conclusions of law the said Nancy by her counsel excepted.

Partition of the land was then decreed and made, setting off to the plaintiff nineteen thirty-sixth parts as his share therein, and otherwise disposing of the residue.

Error is assigned by Nancy Long, who alone appeals: 1. Upon the sustaining of the demurrer to the first paragraph of the cross complaint. 2. Upon the conclusions of law drawn by the court from the facts as found by it.

The appellant contends that the acknowledgment of the deed set out in the first paragraph of her cross complaint was so fatally defective, when considered with reference to the law in force at the time it was taken, as to render the deed void as to her, and that, for that reason the court erred in sustaining the demurrer to that paragraph. The second paragraph of the cross complaint, however, set out the deed and the acknowledgment, in the same manner as the first, and the question argued upon the acknowledgment was as well presented by the second as by the first paragraph. If,

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therefore, the demurrer to the first paragraph was erroneously sustained, a question we have not considered, the error was a harmless one, and as no reference was made to the acknowledgment in the special finding, no question is reserved upon it for our consideration here.

The appellant further contends that, as her mother was in the lawful possession of the land during her, the said mother's, natural life, the ancient and best established method of disaffirming a deed, by entry on the land, would have been unauthorized and unavailing, and that, by analogy, any other mode of disaffirmance would have been equally ineffectual, during the lifetime of the mother; and that a reasonable time for the disaffirmance of the appellant's deed had not elapsed between the time of the mother's death and the commencement of this suit. As applicable to the doctrine thus contended for by the appellant, it may be said—

First. That there are in this State several well recognized modes of disaffirming a voidable deed. The disaffirmance may be by entry upon the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act, declaratory of an intention to disaffirm. *Law v. Long*, 41 Ind. 586; *Scranton v. Stewart*, 52 Ind. 68. The appellant might, therefore, have disaffirmed by other means than an entry upon the land.

Secondly. That it is the act of disaffirming which destroys a voidable deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made. *Potter v. Smith*, 36 Ind. 231.

It was not necessary that the appellant should have been in a position to recover the possession of the land when she disaffirmed her deed to the appellee. She might have brought an action to quiet her title without being entitled to possession. 2 R. S. 1876, p. 254, sec. 611.

The possession of her mother was, therefore, no excuse

Cohn v. Rumely et al.

for the failure of the appellant to disaffirm her deed within a reasonable time after her arrival at full age.

We see no error in the proceedings below. The judgment is affirmed, with costs.

No. 7815.

COHN v. RUMELY ET AL.

74	120
126	550

DISMISSAL.—*Announcement of Finding.—How Made.—Statute Construed.*—

An entry by the judge, on his docket, of the finding in a cause, is not an announcement of the finding, within the meaning of the first clause of section 363 of the code, 2 R. S. 1876, p. 184. Such announcement, to bar the plaintiff's right to dismiss his action, must be made orally, in open court, or by means of a public record which will bring the ruling to the knowledge of the parties.

From the Laporte Circuit Court.

W. H. Calkins and *D. J. Wile*, for appellant.

W. E. Higgins, for appellees.

ELLIOTT, J.—The single question presented by this record is whether an entry made by the court, on its own docket, is to be deemed the announcement of a finding, within the meaning of section 363 of the code. A brief extract from the record will show the character of the question and the manner in which it is presented. We quote from the record the following:

“After all the evidence had been introduced, the court wrote and entered the following words upon the judge's docket, viz.: ‘Find. for Defts. Judgt. vs. Plff. for costs.’ Thereupon, before the court had orally announced its finding, the said plaintiff offered and asked leave to dismiss his said action; but the court refused to permit him so to do, to which ruling of the court the plaintiff at the time ex-

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cepted; that thereupon the court proceeded to and did render judgment against the plaintiff, as heretofore set out in the record, to the rendition of which said judgment the plaintiff, at the time, objected and excepted.”

We think there was no such announcement of the finding as deprived the appellant of his right to dismiss. An announcement must be orally made in open court, or by means of a public record which will bring the ruling to the knowledge of the parties.

Judgment reversed.

No. 9020.

THE STATE, EX REL. STINGLEY, *v.* SULLIVAN ET AL.

COUNTY COMMISSIONERS.—County Work.—Gravel Road.—Statute Construed.—When the commissioners of a county take charge of the construction or improvement of a free gravel road, such construction or improvement becomes at once a county work, within the meaning of the act of March 14th, 1877. Acts 1877, Spec. Sess., p. 29.

SAME.—Bond.—Contract.—When any work is placed in charge of the commissioners as a county work, they are required to take a bond which shall guarantee the faithful performance and execution of the work, and that the contractor shall promptly pay all debts incurred by him in the prosecution of such work, including labor, material furnished, and for boarding the laborers.

SAME.—Title of Act.—Boarding Laborers.—The subject-matter and general character of the act of March 14th, 1877, are fairly expressed in the title, and it comprehends the provision for the payment of persons boarding laborers.

SAME.—Jurisdiction.—Until the commissioners of a county have acquired jurisdiction over a gravel or other similar road, and ordered either its construction or improvement, they are wholly without authority either to let a contract for work upon such a road, or to take bond.

PLEADING.—Complaint.—Fatal Omission.—A failure to aver that the commissioners had ordered either the construction or improvement of a gravel road is a fatal omission from a paragraph of complaint on a bond taken under the provisions of said act of March 14th, 1877.

74	121
137	143
137	559
74	121
142	186
74	121
145	459
74	121
152	18
74	121
167	203
74	121
171	666

The State, *ex rel.* Stingley, v. Sullivan *et al.*

From the Montgomery Circuit Court.

A. D. Thomas, J. E. Humphries, G. D. Hurley and B. F. Crane, for appellant.

G. W. Paul, J. R. Courtney and — *Graham*, for appellees.

NIBLACK, C. J.—This action was brought by the State, on the relation of John B. Stingley, against John Sullivan, Maurice Carroll, Fisher Doherty, Edward Holmes and Ephraim C. Griffith. The complaint was in two paragraphs.

The first paragraph stated, that, in the year 1879 and prior to the 10th day of June of that year, the board of commissioners of the county of Montgomery, acting upon a proper petition and in pursuance of the provisions of the act of March 3d, 1877, authorizing the boards of commissioners of the several counties to construct gravel, macadamized, or paved roads, had ordered the construction of a gravel road in said county of Montgomery, known as the Linden Gravel Road, and being about to enter into a contract with the defendants Sullivan and Carroll, for the construction and building of said gravel road, they, the said Sullivan and Carroll, together with the other defendants, Doherty, Holmes and Griffith, as their sureties, on said 10th day of June, 1879, executed to the State of Indiana their bond in the penal sum of nine thousand dollars, conditioned that the said Sullivan and Carroll should well and faithfully perform their contract and promptly pay all debts incurred by them in the prosecution of their work, including labor, and for boarding the laborers thereon, in the event that the contract should be awarded to the said Sullivan and Carroll; that thereupon the said board of commissioners awarded such contract to the said Sullivan and Carroll, and accepted and approved said bond; that afterward the said Sullivan and Carroll entered upon the construction of the said gravel road, under their contract, and became indebted to the relator,

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John B. Stingley, in the sum of eighty-two dollars and fourteen cents, for work done and labor performed upon said road, and for boarding the hands while at work on such road, a bill of particulars of which said indebtedness was filed with the complaint; that said relator had demanded the sum of money so due him of the said Sullivan and Carroll, which said sum remained unpaid. Wherefore judgment was demanded.

The second paragraph contained nearly all the material facts averred in the first paragraph, but in a different form and in a different order.

The defendants demurred, severally, to each paragraph of the complaint, and their demurrer was sustained to both paragraphs.

The relator failing and refusing to plead further, final judgment was rendered in favor of the defendants upon their demurrer.

The bond sued on, a copy of which was filed with the complaint, was as follows:

“Know all men by these presents, that we, Maurice Carroll and John Sullivan, Fisher Doherty, Edward Holmes and E. C. Griffith, all of the county of Montgomery and State of Indiana, are held and firmly bound unto the State of Indiana in the penal sum of nine thousand dollars (\$9,000), lawful money of the United States, for the payment of which well and truly to be made, we severally bind ourselves, our heirs, executors and administrators. Witness our hands and seals, this 10th day of June, 1879.

“The conditions of the above obligation are such that if the above named and bounden John Sullivan and Maurice Carroll shall be awarded the contract by the commissioners of Montgomery county, Indiana, and Ira McConnell, engineer, for building the Linden Gravel Road: Now if the said John Sullivan and Maurice Carroll shall well and faithfully perform the said contract, and promptly pay all debts incurred by them in the prosecution of such work, including

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labor and for boarding the laborers at work thereon, then this obligation to be null and void; otherwise to remain in full force and effect.

JOHN SULLIVAN, [Seal.]

“MAURICE CARROLL, [Seal.]

“FISHER DOHERTY, [Seal.]

“EDWARD HOLMES, [Seal.]

“E. C. GRIFFITH. [Seal.]”

By the act of March 3d, 1877, above referred to, it is provided that the board of commissioners of any county shall have power to lay out, construct, or improve, by straightening, grading, draining, paving, gravelling or macadamizing, any State or county road, or any part of such road, within the limits of their county, upon certain conditions and proceedings therein prescribed; that upon the return of a report of viewers and a surveyor or engineer, to be appointed by them, such commissioners shall, if in their opinion public utility requires it, enter of record an order that the proposed construction or improvement be made, stating the kind of construction or improvement to be made, and the width and extent of the same, and the land to be assessed for the expense of such construction or improvement; that, after the making of the order for such construction or improvement, the commissioners shall cause a contract to be let for the performance of the contemplated work, and appoint an engineer to superintend the work and the completion thereof, which roads, when so built or improved, are to be free from toll. Acts Reg Sess. 1877, p. 82.

By an act, known as “An act entitled an act to indemnify counties against loss in certain cases, and to protect laborers, material men and others from loss by persons contracting for county buildings and work,” approved March 14th, 1877, it is further provided “That no bid for the building or repairing of any court-house, jail, poor asylum, bridge, fence or other county building or work, shall be received or entertained by the board of commissioners of any county in this

The State, *ex rel.* Stingley, v. Sullivan *et al.*

State, unless such bid shall be accompanied by a good and sufficient bond payable to the State of Indiana, signed by at least two resident freeholders [as] sureties, which bond shall guarantee the faithful performance and execution of the work so bid for, in case the same is awarded to said bidder, and that the contractor so receiving said contract shall promptly pay all debts incurred by him in the prosecution of such work, including labor, materials furnished and for boarding the laborers thereon," and "That any laborer and material man, or person furnishing board to said contractor, * * * shall have the right of action against such contractor and his bondsmen therefor: *Provided*, such person shall have first demanded payment of the same from such contractor." Acts. Spec. Sess. 1877, p. 29.

By an act, approved March 24th, 1879, which was obviously intended to be supplemental to the act of March 3d, 1877, *supra*, it is further enacted that, by virtue of their office, the commissioners of any county are constituted a board of directors, under whose management and control all free gravel, macadamized, paved and turnpike roads in such county shall be exclusively vested.

The underlying question in this case is, was the construction of the Linden Gravel Road a county work within the meaning of the act of March 14th, 1877, above set out, and in the sense which authorized and required the appellees to execute and deliver to the county commissioners such a bond as the one sued upon?

As has been seen, the act of March 3d, 1877, confers on the county commissioners the power to lay out, construct and improve gravel roads in their respective counties, in certain cases, and imposes upon them the duty, when they have ordered any such work to be done, of causing proper contracts to be made for the performance of the work, and of appointing some suitable person to superintend such work, and to see that it is completed according to the contract.

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As has been further seen, the act of March 24th, 1879, constitutes the county commissioners of the several counties directors of the free gravel roads of their respective counties, and vests them with the exclusive management and control of such roads.

With the powers thus conferred on the county commissioners, the conclusion appears to us necessarily to be that when such commissioners take charge of the construction or improvement of a free gravel road, such construction or improvement becomes at once a county work within the meaning of the act of March 14th, 1877.

In contemplation of law, the board of commissioners of a county is the county, and in legal proceedings a county is only known through its board of commissioners. *Haag v. The Board, etc., of Vanderburgh County*, 60 Ind. 511.

Any work, therefore, placed in charge of the commissioners of a county is, in legal contemplation, in charge of the county represented by such commissioners, and thereby inevitably becomes a county work, for the performance of which the commissioners are required to take a bond, similar to the one before us.

But the appellees contend that, in any event, so much of the act of March 14th, 1877, as requires the bond therein provided for, to contain a stipulation for the payment of persons boarding laborers employed upon a county work, is inoperative and void, because the title of that act is not sufficiently comprehensive to authorize the enactment of such a provision. The position thus assumed by the appellees can not be maintained.

The subject-matter and general character of the act are fairly expressed in its title, and that is all that is required by article 4, section 19, of the constitution.

An objection might have been urged to the first paragraph of the complaint, for uncertainty in many of its averments, particularly in reference to some of its dates, and the order

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of time in which certain alleged events occurred, as well as in some other respects ; but, as those defective averments were probably not reached by the appellees' demurrer, we will not further refer to them. Considering only such questions as have been discussed by counsel, no valid objection has been shown to the sufficiency of the first paragraph of the complaint. Our conclusion, consequently, is, that the court below erred in sustaining a demurrer to that paragraph.

The second paragraph of the complaint did not aver that the commissioners of Montgomery county had ordered either the construction or improvement of the Linden Gravel Road. That was a fatal omission. Until the commissioners of a county have acquired jurisdiction over a gravel or other similar road, and ordered either its construction or improvement, they are wholly without authority, either to let a contract for work upon such a road or to take such a bond as the one in suit.

We think the demurrer to the second paragraph of the complaint was correctly sustained.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

No. 7705.

THE CHARLESTOWN SCHOOL TOWNSHIP v. HAY.

PRACTICE.—*Supreme Court.*—*Complaint.*—*Assignment of Error.*—If one paragraph of a complaint be good, an assignment that the complaint does not state facts sufficient to constitute a cause of action will be unavailing.

SAME.—*Commencement of Action.*—*Impetration.*—The general rule is, that an action is not commenced until the impetration of the writ.

74	127
152	587

74	127
171	244

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SAME.—Presumption.—Where the record does not show the issuing of any writ, nor an objection in the court below to the time of bringing the action, the Supreme Court will presume that the action was commenced when appearance was made and answer filed.

PLEADING.—Complaint.—Presumption.—Evidence.—Defects Aided by Finding.—Many defects which a demurrer would reach are aided by a verdict or the finding of the court, and where there are sufficient general facts stated in the complaint to show that the omissions were such as might have been supplied by the evidence, they will be presumed, on appeal, to have been so supplied.

SAME.—Common School.—Township Authorities.—Waiver.—A teacher of a common school is entitled to compensation, if the failure to actually conduct the school each day of the term was caused by the wrongful act or omission of the township authorities; and where the evidence shows that a strict performance of the conditions has been prevented or waived by such act or omission, a recovery can not be defeated by such failure.

From the Clark Circuit Court.

M. C. Hester, for appellant.

C. P. Ferguson and *J. K. Marsh*, for appellee.

ELLIOTT, J.—The appellant for the first time challenges the sufficiency of the complaint by the assignment of errors in this court. The first paragraph of the complaint is confessedly bad, and we dismiss it from consideration. If the second is bad, the appellant's assignment must prevail; if good, the assignment must fail; for, if there is one good paragraph of a complaint, an assignment that the complaint does not state facts sufficient to constitute a cause of action will be unavailing.

The complaint is based upon a written contract wherein the appellee agrees to teach school for twenty-six weeks, of five days each, in district number two of the township, commencing on the 17th day of September, 1877; that she will keep a faithful record of the daily attendance of pupils, and in all respects conform to the requirements of the school law. The township, in consideration of the appellee's promises, agrees to furnish and keep in repair school-house and

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furniture ; to furnish necessary fuel, blanks, apparatus, “and such other educational appliances as are necessary for the thorough organization and efficient management of the school, and to pay the appellee \$290.50, or such portion thereof as shall be due the said teacher at \$2.25 per day, as above agreed upon, for services she actually performed, to be paid upon receipt of her report as teacher of said school, made, subscribed and sworn to, as the law provides.” It is alleged that the appellee was duly licensed as a teacher ; that she entered upon the work of teaching under the written contract executed between her and the appellant ; that she continued teaching until the 15th day of January, 1878, when the school-house was destroyed by fire ; that she immediately thereafter informed the appellant of the destruction of the school-house, and requested the trustee to furnish a house, fuel, furniture, and appliances provided for by the contract, but that the appellant failed to furnish or provide them. It is averred that the appellee was at all times ready and willing to teach the school for the remainder of the term provided for ; and it is also averred, that “she, in all things, complied with all the conditions and stipulations of said contract, on her part, but that the said trustee has paid her for her services \$183.75 ; that there is still due her and unpaid the sum of \$96.75.” To the averment of performance just quoted the appellee added the following excuse for non-performance : “The plaintiff says she was unable, after the burning of said house, to make any report, for the reason that the data thereof, kept by her, were burned with said house, and she is unable to make the report from memory.”

It is insisted that the complaint ought to be held bad, because the twenty-six weeks, which the appellee agreed to teach, had not expired when the complaint was filed. It is shown by the record that the complaint was filed before the expiration of that time, but it does not appear that any summons was issued or served. The appearance of appellant

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was not entered until the 24th of April, 1878, and this was long after the expiration of the twenty-six weeks. The filing of the complaint was not the commencement of the action. The general rule is that an action is not commenced until the impetration of the writ. *Fordice v. Hardesty*, 36 Ind. 23; *Evans v. Galloway*, 20 Ind. 479; *Hancock v. Ritchie*, 11 Ind. 48. The record not showing the issuing of any writ, and not showing any objection made in the court below to the time of bringing the action, we must presume that the action was commenced when appearance was made and answer filed. The fact, that no objection was made to the complaint upon the ground that the action was prematurely brought, adds strength to the presumption that the action was not commenced until the appellant voluntarily appeared.

It is contended that the complaint is bad, for the reason that it does not show a filing, or an excuse for not filing, the report required of the teacher. It is argued that the filing of the report with the trustee was a condition precedent, of which strict performance was required. The complaint does not very fully show either performance or an excuse for non-performance of this condition, but we think it was so aided by the finding that we can not now pronounce against it. Many defects which a demurrer would reach are aided by a verdict, and the finding of the court must, in this respect, be given the same effect as the verdict of a jury. *Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294; *Parker v. Clayton*, 72 Ind. 307; *Newman v. Perrill*, 73 Ind. 153.

The complaint is next assailed upon the ground that, as it was the duty of the teacher to preserve the school-house from destruction by fire, and as it burned, she is not entitled to recover. The statement of the argument supplies the refutation. We have not, it is proper to add, stated the argument in the language used by counsel, but we have stated it in substance and effect.

An objection of a more important nature than those we

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have considered is urged against the complaint. This objection is that the complaint fails to show such facts as entitle the appellee to recover beyond the time in which she was actually employed in teaching. The argument is built upon the clause which provides that the teacher shall receive compensation at the rate of \$2.25 per day for services she actually performs. It is insisted that she can not, in any event, recover where she does not actually render services ; but, as we shall hereafter show, this construction can not be maintained. It is by no means clear that the complaint does properly and sufficiently plead such facts as entitle the appellee to recover for the time in which she was not actually engaged in teaching. We have concluded, however, that there are sufficient general facts stated in the complaint to show that the omissions were such as might have been supplied by the evidence, and it is, therefore, our duty, under the settled rule to which we have heretofore referred, to hold that they were supplied.

We find one good paragraph of the complaint, and must, therefore, rule against appellant on the questions made upon the complaint. *Firestone v. Daniels*, 71 Ind. 570.

The remaining questions are those arising upon the error assigned upon the ruling denying a new trial.

The meaning to be assigned to the clause of the contract providing that the township "agrees to pay the said Ada Hay, ● for services as teacher of said school, the sum of \$290.50, or such portion thereof as shall be due said teacher at \$2.25 per day, as above agreed upon, for services she actually performed," is not so narrow and stringent as that for which appellant contends. The appellant contends that, no matter what may prevent the teacher from actually conducting the school, her right to compensation must be confined to the days in which the school is actually taught by her. Notwithstanding the clause quoted, we are clear that the appellee is entitled to compensation, if the failure to actually

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conduct the school each day of the term was caused by the wrongful act or omission of the township authorities.

Construing the contract as not precluding a recovery where actual performance was prevented by the act or omission of the appellant, the remaining question is whether the evidence shows that performance was prevented by something wrongfully done or omitted by the township trustee.

We are satisfied, from a careful reading of the evidence, that the court did not err in accepting the testimony of the appellee as the correct statement of the material facts. From the appellee's testimony it appears that the school-house was accidentally destroyed by fire ; that, upon discovering that the house had been destroyed, she notified the school director of the district ; that the director instructed her to procure a house in which to conduct the school ; that she did procure a church building for that purpose ; that the trustee was notified that she had secured the church building, but that no fuel or furniture was furnished, although the trustee promised to furnish them. No pupils came to the church, and this fact was reported to the trustee, but nothing was done by him towards furnishing either furniture or fuel, nor was the appellee informed that her services were dispensed with, but she was put off from time to time by promises to provide house, furniture and fuel. One of the witnesses for the • appellee notified the trustee that she, the appellee, was ready and willing to teach the school, and that she would demand compensation for the full term, and to this witness dilatory excuses were given by the trustee. We think this evidence showed that actual performance on the part of appellee was prevented by the appellant's officers, and that a recovery can not be defeated upon the ground here relied upon by appellant.

Appellee, as excusing her failure to file a report, testified that she could not make one because "the data for making it were burned with the school-house." It is insisted that

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the excuse shown is insufficient, and that there can, therefore, be no recovery. We do not think it necessary to inquire whether the excuse is or is not sufficient. The performance of the condition was waived. The evidence shows that the appellee was put off by excuses from time to time; that no report was ever asked of her, nor was any complaint made that she had not prepared the required report. The evidence does show that a report was made to the trustee on the 4th day of April, 1878, wherein the number of days actually taught and the number of pupils in attendance are shown, and wherein the following statement appears: "The remainder of the school term was not taught, for the reason that, on the 16th day of January, 1878, the house in which said school was taught, and the apparatus used, were destroyed by fire, and no suitable house could be furnished by trustee." It is also shown by the record that, for the eighty-seven days in which school was taught, the appellee was paid in full. Neither then nor at any other time was any complaint made of the failure to make the report provided for by the contract. The refusal to pay was not placed upon the ground that the report was not made; but, as is very evident from the whole record, payment was refused upon the sole ground that the appellee was only entitled to compensation for the time she actually conducted the school.

The judgment is affirmed, at costs of appellant.

No. 8723.

**THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF
INDIANAPOLIS *v.* WASSON, TREASURER, ET AL.**

CITIES AND TOWNS. — *City Treasurer.* — *Compensation.* — *Statute Construed.* — *Taxes.* — The act of March 11th, 1875, Acts 1875, Reg. Sess., p. 148, legalizing the assessment and collection of municipal taxes, was not designed to, nor did it in any way, change the law concerning the salary, compensation, fees or emoluments of city treasurers.

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180	619

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SAME. — *Salary of City Treasurer.* — *Statute Construed.* — *Taxes.* — *School Commissioners.* — By section 51 of the act for the incorporation of cities, 1 R. S. 1876, p. 267, city treasurers are to be paid for general services a salary to be accurately determined and fixed on some certain basis by the city council. It may be a percentage on the taxes levied, but it can not be on the taxes collected during the year; nor are city treasurers entitled, in addition to such salary, to a percentage of the taxes collected by them, assessed by the city board of school commissioners, by the provisions of the act of March 3d, 1871, 1 R. S. 1876, p. 817, in relation to schools in cities of thirty thousand or more inhabitants.

SAME. — *Salaries of City Officers.* — There is no authority in said act of March 3d, 1871, for a city or its officers to charge any part of the salaries of its officers named in section 51, *supra*, against the taxes collected for the city school corporation.

SAME. — *Fees and Charges for Collecting Taxes.* — *Distress and Sale.* — The fees and charges allowed a city treasurer for the collection of taxes by distress and sale, by section 44 of the act for the incorporation of cities, are such only as are allowed constables on an execution sale, and do not include the percentage allowed county treasurers for similar services, and such fees and charges are collectible out of the property of the taxpayer in each case, and can be deducted from the amount of the tax, interest and penalty only in case the sum realized is insufficient to pay both.

SAME. — *Presumption.* — *Complaint.* — *Demurrer.* — Upon a demurrer to a complaint in an action by the board of school commissioners of a city, against the city treasurer, to recover school tax levied by them and claimed by such treasurer as fees and charges for collections made by distress and sale, it will be presumed that such officer levied on property sufficient to pay all that was due, including his own fees and charges.

From the Marion Superior Court.

N. B. Taylor, F. Rand and E. Taylor, for appellant.

C. Baker, O. B. Hord, A. W. Hendricks, J. A. Henry and *R. O. Hawkins*, for appellees.

WOODS, J. — The errors assigned bring before us for review the rulings of the superior court upon the demurrers to the complaint, whereby it was held that each paragraph of the complaint failed to state a good cause of action. The questions involved in these rulings are, however, not questions of pleading or averment, but entirely of statutory construction or interpretation, and we therefore deem it unnecessary to set out a copy of the complaint.

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The following extracts from the opinion delivered at the special term state the case clearly, and, besides indicating the grounds on which the superior court reached its conclusions, will facilitate the presentation of the reasons on which the judgment of this court is based :

“The plaintiff is organized under the provisions of the act of March 3d, 1871, 1 R. S. 1876, p. 817, which provides for a general system of common schools in cities of thirty thousand or more inhabitants, and for common school libraries therein.

“By the second sub-section of section 4 of that act, the plaintiff is empowered ‘To levy all taxes for the support of the schools within such city including such taxes as may be required for paying teachers in addition to the taxes now authorized to be levied by the General Assembly of this State by the general laws thereof.’

“The fifth section provides that all levies of taxes made by the board shall be certified to the city clerk, who shall cause the same to be placed on the tax duplicate, ‘and the city treasurer shall collect the same as city taxes are collected, and shall once in each month pay over all such taxes so collected to the treasurer of the board of school commissioners of such city.’

“By the third section of the act of February 13th, 1877, Regular Session 1877, p. 15, the board is restricted to a levy of twenty cents on the hundred dollars ; but a proviso allows the same levy for library purposes as did the act of March 3d, 1871.

“This action was instituted to recover a percentage on the amount of the school tax levied by the plaintiff, and which the defendant Wiles has detained, under claim thereto, as compensation for collection. The first paragraph of the complaint charges the detention of \$1,217.11 as percentage for the collection of delinquent taxes in the sum of \$24,250.60 paid voluntarily ; the second and fourth charge the deten-

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tion of \$672.82 as percentage on \$89,221.88 of current taxes collected; and the third of \$992.08, on the sum of \$16,543.74, which was the principal, damages, and interest of taxes delinquent and collected by seizure and sale, or sale of property.

“The legal sufficiency of the several paragraphs is questioned by the demurrer, and whether the latter is well taken must depend in the main upon the force and construction to be given to the various statutory provisions bearing upon the subject presented.

“The second section of the act of March 11th, 1875, 1 R. S. 1876, p. 338, provides that the general law of the State, and amendments thereto, for the uniform assessment of taxes, shall apply to all incorporated cities not having special charters, so far as applicable; and it is also provided that all city taxes shall be payable on or before the third Monday in April in each year.

“In the general law referred to—the act of December 21st, 1872—it is provided that after deducting the amount of taxes returned delinquent, and the collection fees allowed the treasurer, from the several taxes charged on the duplicate, in a just and ratable proportion, the treasurer shall be liable for the balance. Sub-section 5 of sec. 180, 1 R. S. 1876, p. 117. Although the section containing this provision was amended by the act of March 7th, 1877, Regular Session 1877, p. 142, the fourth sub-section is the same as that to which I have referred.

“By section 161 of the general law, the treasurer of the county is allowed five per centum on the amount of delinquent taxes collected without distraint and sale, payable in just proportion out of each fund collected, and is to be allowed constable's fees and mileage, which are to be collected from the taxpayers.

“The forty-fourth section of the general law relating to cities (act of March 14th, 1867, 1 R. S. 1876, p. 285,) provides :

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‘The treasurer shall be entitled to such fees for collections made by distress and sale, and charges for keeping and removing property distrained, as are paid to county treasurers for like services.’

“The fee and salary act now in force, and that of March 12th, 1875, 1 R. S. 1876, p. 467, provides, in section 14 thereof, that the treasurer shall, in addition to the general salary allowed by section 13, charge and receive the further compensation of one per centum on the first \$100,000 of taxes collected, and one-half of one per centum on all sums in excess thereof, which shall be paid from the moneys in the treasury belonging to the county, etc., and he shall receive and retain out of all delinquent taxes collected, five per centum when paid voluntarily and without levy, and six per centum if paid after levy; and he is allowed the same fees and charges in case of distraint and sale of goods as received by constables.”

After reciting these statutory provisions, the opinion and argument proceed in the main on the theory that, by force of the act of March 11th, 1875, the act of December 21st, 1872, for the uniform assessment and collection of taxes was made applicable to cities, not only in respect to the manner and time of making the assessment and collection of taxes, but also in respect to the compensation of city treasurers, the court holding that by reason of said enactments the city treasurer was entitled for collecting delinquent taxes to the same percentages, fees and charges as are allowed to county treasurers for like services, but that for collecting current taxes, though the county treasurer was allowed one per centum, the city treasurer was bound by the city ordinance which allowed three-fourths of one per centum.

We give verbatim so much of the act of March 11th, 1875, as can be claimed to bear upon the present subject of discussion :

“An act legalizing the assessment, equalization, levy and

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collection of municipal taxes for the years 1873 and 1874, providing that the general law governing state and county taxation, so far as the same provides for the manner and time of making the assessment and collection of taxes, shall apply to incorporated cities and towns, and declaring an emergency." Approved March 11th, 1875.

"Section 1. *Whereas*, There is no express provision in the act approved December 21st, 1872, entitled 'An act to provide for a uniform assessment of property, and the collection and return of taxes thereon,' that makes the same applicable to incorporated cities and towns; And *whereas*, the general law governing cities, approved March 14th, 1867, for the incorporation of cities, provides a different time, mode and manner for the assessment, equalization, levy and collection of taxes by cities, owing to which uncertainty of application, some cities have acted under the one, and other cities under the other law, so that the assessment, levy, and collection have not been uniform; therefore, *Be it enacted*," etc. This section proceeds to legalize, in the particulars referred to in the title and preamble, the acts of cities for the years 1873 and 1874.

"Sec. 2. Hereafter the general law of the state and amendments thereto, approved December 2d, 1872, for the uniform assessment of taxes, shall apply to all incorporated cities and towns not having special charters, so far as the same shall be applicable: *Provided*, That all city taxes shall be paid on or before the third Monday in April in each year."

The title of this act specifically indicates the extent to which it was proposed to apply the general law concerning taxation to cities and towns, and it may well be doubted, whether the text can be upheld, if it goes further than the title. *The State v. Bowers*, 14 Ind. 195.

We are, however, of the opinion that this act has no bearing on the questions before us. It was not, in our judgment, the design nor the effect of it, in any way, to change

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the law concerning the salary, compensation, fees or emoluments of city treasurers. The purpose of the enactment, as shown by its title, preamble and text, was to provide, "that the general law governing state and county taxation, so far as the same provides for the manner and time of making the assessment and collection of taxes, shall apply to incorporated cities and towns," except "That all city taxes shall be paid on or before the third Monday in April in each year." If section 2, providing, as it does, that "Hereafter the general law of the state and amendments thereto, approved December 2d" (meaning clearly December 21st), "1872, for the uniform assessment of taxes, shall apply to all incorporated cities and towns not having special charters, so far as the same shall be applicable," stood alone for interpretation, without aid from the title or preamble, we should not deem the inference warranted that the compensation, salary, fees or percentages, allowed in favor of county treasurers, should thereafter, in whole or in part, be allowed to city treasurers for like services.

It is conceded that Indianapolis has no special charter, but is governed by the general law of cities, approved March 14th, 1867, 1 R. S. 1876, pp. 267-314, and by such amendatory and supplemental laws as have been since enacted. By section 8 of that act, "The officers of such city shall consist of a mayor, two councilmen from each ward, a city clerk, assessor, treasurer," etc., and by sections 31 to 44, inclusive, the general duties of the treasurer are defined. The 51st section provides that "The common council shall, within one month after the annual election in each year, fix the salaries of all the officers of such city, provided for in this act, and by ordinance provide for the payment of the same, which salaries shall be paid on the first day of January, April, July and October in each year, when so fixed, and shall not be increased during that year." A clause of section 44 declares that "The treasurer shall be entitled to such fees for collec-

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tions made by distress and sale, and charges for keeping and removing property distrained, as are paid to county treasurers for like services ;” and section 71 allows such treasurer certain fees and commissions for collecting assessments for street improvements by sales of lots.

Besides these there are no provisions for the compensation of city treasurers, in the act concerning cities, and, in our opinion, these provisions remain in force, unaffected by the act of March 11th, 1875. The policy of the act of March 14th, 1867, was, that each city should fix the compensation of its own officers, and we think it clear that that policy has not been abandoned for the sake of substituting the uncertainties and impolicy of fee and salary legislation.

The inquiry before us, therefore, does not lead to a consideration of the various enactments which define the pay or commissions of county treasurers further than is required by the clause quoted above from section 44. We need determine only the proper construction of said sections 44 and 51, taken in connection with the act of March 3d, 1871, the provisions of which have been already stated sufficiently for our purpose. The appellant contends for a literal construction of the clause of that act which, speaking in reference to the taxes levied by the plaintiff, says “the city treasurer shall collect the same as city taxes are collected ;” while the appellees claim that there is an implied intent that, as an incident to the collection, the treasurer shall have the same pay for such collections as for collecting city taxes proper. This brings us to the question whether, in legal contemplation, there is any pay or compensation allowed the city treasurer, as an incident to his collecting the city taxes. In some degree, at least, the solution of this question depends on the proper construction to be given to the 51st section of the law of cities, whereby it is required that city officers be paid by salaries, to be fixed each year by the city council. It is admitted in one paragraph of the complaint, and con-

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ceded or assumed in the briefs on both sides, that the common council of Indianapolis had provided by an ordinance, that the city treasurer should receive for collecting taxes not delinquent three-fourths of one per centum of the amount collected ; and the question is raised and earnestly discussed whether this ordinance was within the power of the council to pass, and, if valid, whether it applied to the taxes collected for the plaintiff.

In the case of *Cowdin v. Huff*, 10 Ind. 83, the meaning of the word *salary* was considered, and it was there said :

“There are now, and were, at the adoption of our constitution, at least three modes in use of compensating persons engaged in the public service, viz., fees, salaries and wages. These modes are all different, each from the other ; and the difference between them has been immemorially well understood. **FEES** are compensation for particular acts, or services, as the fees of clerks, sheriffs, lawyers, physicians, etc. **WAGES** are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc. **SALARIES** are the *per annum* compensation to men in official and some other situations. The word *salary* is derived from *salarium*, which is from the word *sal*, salt, being an article in which the *Roman* soldiers were paid. See [the dictionaries of] *Richardson*, *Webster*, *Bouvier* and *Wharton*.

“Where the constitution does not provide otherwise, the State may adopt either of these modes of compensating those who may be in her service. But where that instrument does prescribe a mode, that mode must be followed.”

It must be equally clear, that where the law prescribes the mode in which city officers shall be paid, that mode must be followed ; and, as this judicial declaration of the meaning of the word in the constitution and laws of this State had been made before the enactment of the act of March 14th, 1867, we may fairly presume that the Legislature intended the same meaning of the word as used in section 51 of that act.

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Looking to the dictionaries, we find in *Webster's Unabridged* the word "salary" is defined to be "the recompense or consideration, stipulated to be paid to a person for services ; annual or periodical wages or pay ; hire ;" and the synonyms given are, "stipend ; pay ; wages ; allowance ;" and in *Worcester's Dictionary* the definition is, "An annual or periodical payment for services, a stipulated periodical recompense ; a stipend ; wages ; hire ; an allowance." But the context in which the word is used in section 51, aside from authority, leaves no room for debate as to the meaning there intended. An annual salary was meant, of a fixed amount, payable quarterly (in equal instalments), and not to be increased during the year for which it was fixed.

It may be, as contended by counsel for the appellees, that this requires only that the amount of the compensation be fixed, and does not "limit, qualify or restrict the power of that body to determine in its discretion the character of that compensation, of what it shall consist, and from what source to come." It must, however, consist of money, derived from sources within the lawful control of the city, and the amount must be specifically stated ; or, if an attempt be made to fix the salary by an allowance of percentages, the percentages must be allowed on determinate sums, so that the total amount of the salary shall be certain and knowable at the time when fixed. It may be a percentage on the taxes levied, but it can not be on the taxes collected during the year, because that would be uncertain until the end of the year. But it is plain that the Legislature contemplated no such indirect way of fixing a salary ; and a salary, whether so fixed or given directly in a sum stated, could not be deemed an incident so connected with the collection of the city taxes as that when the act of March 11th, 1875, was passed, containing the provisions under consideration, it could have been intended to enlarge that salary in proportion to the amount of taxes collected for or levied by the plaintiff, or that the

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plaintiff should be liable for a pro rata share of the salary, whether fixed in one way or the other. The constitution requires that the laws be uniform. Counsel for the appellee admit that section 51 is not repealed, and that the city council may still fix a salary for the city treasurer, but claim that such treasurer may, if the common council see fit to so order, receive a percentage, to be fixed by an ordinance, for collecting current taxes not delinquent. Whither does the reasoning lead us? The argument is that the percentage so fixed for collecting the city tax proper becomes an incident of the collection, and that by force of the act of March 3d, 1871, it becomes also an incident to the collection of the taxes of the plaintiff. But one city may allow one percentage and another city another, while yet other cities may allow their treasurers no percentage at all, and so the school corporation of one city will be compelled to pay one rate, and of another city another rate, and others yet perhaps nothing, for the collection of their taxes, or, if anything, then a proportionate part of the fixed salaries allowed their treasurers; but, for determining that proportionate part, no rule has been suggested, and we know of none. Indeed, a uniform operation of the law, upon the theory of the appellees, seems to be entirely impracticable. The plain legislative intent manifested in said section 51 is that the council of each city shall fix the salaries of its officers according to the duties and responsibilities of each, and with reference to such other considerations, such as the expenses of living, the financial condition of the city, and the like, as the council in each case may deem proper to take into account; and when the act of March 3d, 1875, was passed, imposing on city clerks and treasurers the duties required of them in relation to the taxes assessed by the school boards, it was not designed to give either of them any claim for services against the school corporation, nor yet was it intended that they should do the work without compensation, but that the salaries allowed

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them from year to year should be adjusted according to the work required of them, including the services so required. This does the city no harm, for the same people who pay the city taxes proper pay the school taxes also, and the result is ultimately the same to them whether the compensation of the officers comes from one fund or another. There is, therefore, no reason for putting a strained construction on the law, and there is no authority expressed, or which can arise by fair implication, for the city or its officers charging any part of their salaries against the taxes collected for the school corporation, all of which the law expressly requires to be paid over monthly to the board of school commissioners. It is no answer to this to suggest that the requirement to "pay over all such taxes so collected" does not include the interest and penalties charged against delinquents, and that these exceed the amounts retained by the defendants out of the taxes collected for the plaintiff. The interest and penalties, when accrued or added, are a part of the taxes to which they are incident, and governed by the same law. The power to collect the plaintiff's taxes the same as city taxes carried with it, as an incident to the power, the right to use all means which could be used to collect city taxes, but in no legal sense had the treasurer an incidental right to receive a percentage or other compensation for making such collections, because his lawful pay was by a salary, and a salary, fixed for services generally, can not properly be deemed to be incident to particular services, nor, without special authority for so doing, could a salary be made incident to the particular services required by any process of apportionment. A part of a salary is for general duties and responsibilities, which could not be apportioned except under an arbitrary and authoritative rule. There is no such rule.

We conclude, therefore, that for all taxes voluntarily paid, whether delinquent or current, the plaintiff was entitled to the entire sums collected, including the interest and penal-

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ties, if any, and the defendants were in the wrong in detaining any part thereof.

It remains to be considered whether a different conclusion is required in reference to collections made by distress and sale of property. This inquiry is applicable to the third paragraph of the complaint only. By the 44th section of the law, as we have already seen, the city treasurer, in addition to the salary allowed under the 51st section, is "entitled to such fees for collections made by distress and sale, and charges for keeping and removing property distrained, as are paid to county treasurers for like services." By the 5th section of an act approved May 31st, 1861, Acts 1861, Spec. Sess., p. 92, which it seems was in force when the act of March 14th, 1867, was passed, it was provided that county "treasurers shall be allowed for their services in making such collections five per centum on the amount of all such collections of delinquent taxes, payable in just proportion out of each fund collected, and shall also be allowed constable's fees and mileage from the place of holding elections in each township to the residence of such delinquent taxpayer, which shall be collected from such taxpayer." But by section 14 of the act of March 12th, 1875, concerning fees and salaries, which had come into force before the collections involved in this suit were made, it was provided that the county treasurers "shall also receive and retain out of all delinquent taxes collected, five (5) per centum, when paid voluntarily, and without levy, and six per centum if paid after levy; and the treasurer shall be allowed the same fees and charges for making distress and sale of goods, and chattels for the payment of taxes, as may be allowed by law to constables for making levy and sale of property on execution." The 26th section of the same act prescribes the fees and charges of constables in such cases. 1 R. S. 1876, pp. 471, 476.

Construing these statutory provisions together, it is mani-

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fest that the fees and charges allowed the city treasurer by the 44th section of the act of March 14th, 1867, are the fees and charges only which are allowed the constable on an execution sale, and do not include the percentages allowed to county treasurers at either rate named. It is equally manifest that these fees and charges are collectible out of the property of the taxpayer in each case, and can be deducted from the amount of the tax, interest and penalty, in case only the sum realized was insufficient to pay both. The presumption is that the officer did his duty, levying on property sufficient to pay all that was due, including his own fees and charges; and, if in fact that was not so, it can be shown by answer.

We therefore conclude that the third paragraph of the complaint, as well as the first, second and fourth, was good, and the demurrers to each should have been overruled.

Judgment reversed, with costs, and cause remanded, with instructions to proceed in accordance with this opinion.

ELLIOTT, J., absent.

No. 6683.

THE STATE, EX REL. SHUCKMAN, *v.* NEFF ET AL.

CONSTABLE.—*Breaches of Bond.*—*Answer.*—*Demurrer.*—To a complaint on a constable's bond, alleging his failure to demand, levy upon, and sell property of the execution defendant, and relator's consequent loss of his judgment, an answer that the constable went to the residence of the execution defendant, demanded of him property whereon to levy, was refused, and thereupon made "diligent search" and utterly failed to find such property, is sufficient on demurrer.

SAME.—*Diligent Search.*—"Diligent search" is a fact, the truth of which is admitted by demurrer, and, if too broadly stated, the only remedy, if any, is a motion for a more specific statement of the facts of the search.

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SAME.—*Insolvency of Execution Defendant.*—An answer that, at the time of the receipt of an execution, and continuously thereafter during the term of office of the constable, the execution defendant was insolvent, is a complete bar to the relator's cause of action. Insolvency may be averred as an existing fact.

SAME.—*Instructions.—Partial Satisfaction of Execution.*—Instructions that, to entitle a relator to recover on a constable's bond, the execution defendant must have been the owner of personal property subject to execution, of which the amount of relator's execution could have been made, are erroneous. It is enough that a part of the amount could have been made.

From the Allen Circuit Court.

M. V. B. Spencer, W. G. Colerick, H. Colerick, T. W. Colerick and *C. P. Jacobs*, for appellant.

A. Zollars and *F. T. Zollars*, for appellees.

Howk, J.—This was a suit by the appellant's relator against the appellees, on the official bond of the appellee Philip J. Neff, as a constable of Madison township, in Allen county, Indiana, to recover damages for certain alleged breaches of the condition of said bond. To the relator's complaint the appellees jointly answered in nine paragraphs, of which the first was a general denial, and each of the other paragraphs was a special answer. The relator demurred separately to each of the special paragraphs of answer, for the alleged insufficiency of the facts therein to constitute a defence to his action; which demurrer was sustained as to the second, third and ninth, and overruled as to each of the other of said paragraphs, and to the latter rulings the relator excepted. He then replied by a general denial to said other paragraphs of answer.

A trial of the issues by a jury resulted in a general verdict for the appellees, the defendants below. The relator's motions for a new trial and in arrest of judgment having been overruled and his exceptions saved to these decisions, the court rendered judgment on the general verdict against the relator, for the appellees' costs.

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In this court, the appellant's relator has assigned as errors the following decisions of the circuit court :

1. In overruling his separate demurrer to the fourth, fifth, sixth, seventh and eighth paragraphs of the appellees' answer ;

2. In overruling his motion for a new trial ; and,

3. In overruling his motion in arrest of judgment.

Before considering any of the questions arising under these alleged errors, we deem it necessary to a proper understanding of the case, that we should give a summary, at least, of the facts stated in the relator's complaint. It was alleged therein that the appellee Philip J. Neff was duly elected a constable of Madison township, in Allen county, and had duly qualified as such constable on the 17th day of October, 1872, and as such had executed his bond in the sum of two thousand dollars, with his co-defendant, Philip Neff, Sr., as his surety therein, a certified copy of which bond was filed with and made a part of the complaint ; that said bond was conditioned for the honest and faithful discharge by the said Philip J. Neff of his official duties as such constable, according to law ; and that thereupon the said Philip J. Neff entered upon the discharge of his duties as such constable.

The relator further said, that on the 10th day of July, 1874, he recovered judgment against one Silas Work, before a justice of the peace of said Madison township, for the sum of \$198.10, with ten per cent. interest, and costs taxed at \$6.90 ; that afterward, on July 25th, 1874, an execution was issued on said judgment by said justice, and placed in the hands of said constable for service and return, according to law ; that at that time, and for a long time thereafter, the said Silas Work was a resident of said township and the owner of a large amount of personal property, situate in said township, of the value of \$500 or more, subject to execution and sufficient to pay said judgment, interest and costs ; and the rela-

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tor averred, that the said Philip J. Neff had not faithfully and honestly discharged his duties as such constable, in this :

1. That he well knew that said Silas Work had personal property subject to execution, within his bailiwick, sufficient to satisfy said execution, yet he failed and refused to demand property from said Work to satisfy said writ.

2. That he did not, within thirty days from the time of receiving said execution, levy the same upon the property of said Work and offer the same for sale, although said Work was the owner of a large amount of personal property, of the value of \$500 or more, within said township, upon which he could have levied said writ and made the money.

3. That he had failed and refused to demand property of said Silas Work, and had failed and refused to levy said execution on such property, although, as he well knew, the said Work was the owner of personal property of the value of \$500 or more, within said township, upon which he could and ought to have levied said writ ; but, while he was holding said execution, he suffered and permitted the sheriff of said county to levy an execution, issued much later than the one in his hands, upon the said property of said Work, and sell the same, although the said execution in his hands was a prior lien on said property, and he made no effort whatever to retain said property or any part thereof, or to collect the money ; but, after holding said execution for seven months, he returned the same, with the following endorsement thereon : "This writ came to hand July 27th, 1874 ; visited the defendant in this writ August 22d, 1874, and no property found there or elsewhere to levy upon ; returned January 25th, 1875 ;" and,

4. The fourth breach was a repetition of the matters stated in the third breach, and the further allegation that, after the date of said execution, and while it was in the hands of said constable, the said Work became insolvent, and that, by reason of the said several breaches of said bond by said con-

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stable, the relator had lost his entire judgment, with interest and costs. Wherefore, etc.

We pass now to the consideration of the questions arising under the first alleged error, and presented and discussed by the relator's counsel in their brief of this cause. These questions relate to the sufficiency of each of the fourth, fifth, sixth, seventh and eighth paragraphs of the appellees' answer, upon the relator's demurrer thereto for the want of facts. The relator's counsel say: "The fourth paragraph of answer fails to show what steps the constable took to discover property and to make the money. It simply avers generally that he made diligent search." It seems to us, however, that counsel have misapprehended the force and effect of the averments of this fourth paragraph. It was alleged therein, in substance, that shortly after the receipt of the execution, to wit, on July 28th, 1874, the said constable went to the residence of the execution defendant and demanded of him property whereon to levy said execution, which demand he refused to comply with, and that thereupon the said constable proceeded to, and did, make diligent search to discover any property of the execution defendant whereon to levy said writ, and had utterly failed to find such property. We think that these averments were amply sufficient to withstand a demurrer for the want of facts. Counsel say, "He should have stated the facts in the case, that the court might have determined whether diligent search was made." We think that "diligent search" is a fact, broadly stated, it is true, but, by demurring to the paragraph, the relator admitted the truth of the fact, just as broadly as it was stated. If the relator wished a specific statement of the acts done by the constable, in making "diligent search," he certainly could not get it by demurring to the paragraph for the want of facts. His only remedy, if any, was a motion for a more specific statement of the facts. *The Cincinnati, etc., R. R. Co. v.*

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Chester, 57 Ind. 297 ; *The Pennsylvania Co. v. Sedwick*, 59 Ind. 336 ; and *Barnett v. Leonard*, 66 Ind. 422.

Of the fifth paragraph of answer, the relator's counsel say: "The fifth paragraph fails to state when he was directed by plaintiff to return the execution. It may have been, after such delay on the part of the constable and the levy of other writs, that nothing could be made, and the making of further costs unjustifiable. This answer is obviously defective." The defect complained of by counsel is not apparent in the fifth paragraph of answer. It was alleged therein "that, upon the receipt of the execution by Philip Neff, Jr., as constable," he would have proceeded to demand property, and make a levy and sale thereon, but that he was prevented from doing so by the relator, who requested him not to levy the execution, but to return it to the justice by whom it was issued. It is not a forced construction of this allegation to say that it fairly imports that the constable was requested by the relator not to levy, but to return, the execution upon the receipt thereof.

Of the sixth and seventh paragraphs of answer, the relator's counsel say that they are similarly defective, and open to the same objections as the fifth paragraph. As we do not think that the objections of counsel to the fifth paragraph are well taken, our conclusion must be the same in regard to the sixth and seventh paragraphs of answer. The supposed defects therein are not apparent, and, if they were, they could not be reached by a demurrer for the want of facts, but only by a motion to make the defective allegations more certain and specific.

Of the eighth paragraph the relator's counsel say: "The eighth answer is bad, because it only goes to a part of the complaint, and does not traverse the averment that the sheriff of Allen county got in ahead of him and levied a writ upon Work's property. It is also an argumentative denial, if anything. It states merely the opinion of the officer, and

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gives no facts as to the insolvency of Work." In the eighth paragraph of their answer the appellees alleged, in substance, "that at the time of the receipt of the execution by Philip Neff, Jr., as constable, as in plaintiff's complaint mentioned, and from thence to the time said constable's term of office expired, to wit, October 17th, 1874, said execution defendant was wholly insolvent, and had no personal property subject to levy and sale under said execution, and for this reason said constable did not make a demand upon said execution defendant, and did not make a levy and sale under said execution; wherefore," etc. We are of the opinion that the relator's demurrer, for the want of facts, to this eighth paragraph of answer was correctly overruled. For, if the facts therein stated were true, and the demurrer concedes their truth, they would constitute a complete bar to the relator's cause of action under the bond in suit. The paragraph alleges a good defence to the entire cause of action stated in the complaint. If it can be properly termed an argumentative denial, such a denial is not always bad, and certainly is not in this case, on a demurrer thereto for the want of sufficient facts. Insolvency is a fact, and in this paragraph of answer the appellees averred the insolvency of the execution defendant as an existing fact, and not as a matter of opinion.

The second error assigned by the appellant's relator is the decision of the circuit court in overruling his motion for a new trial. In this motion a number of causes were assigned for such new trial, some of which, if not all, will be considered in this opinion. The relator's counsel have devoted a very considerable portion of their elaborate brief of this cause to the examination of the evidence in the record, and to the discussion of its alleged insufficiency to sustain the verdict. The view which we shall take of other questions presented by the record renders it unnecessary for us to examine critically or at any length the question whether or not the verdict of the jury was sustained by sufficient evi-

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dence. We may say generally, however, that the evidence is conflicting and unsatisfactory. But, while this is the case, we can not disturb the verdict on the evidence; nor could we have done so, if the verdict had been for the relator instead of for the appellees. It seems to us, that the evidence in the record would have sustained a verdict for the relator, as fully and as satisfactorily as it sustains the verdict for the appellees. We think that evidence was introduced on the trial which tended to sustain the verdict on every material point; and the weight and credibility of the evidence were questions for the jury and the trial court.

We come now to the consideration of the instructions of the court to the jury, complained of as erroneous by the relator's counsel. In the first of these instructions, the court told the jury that to entitle the relator to recover in this action, it was necessary for him to establish by a preponderance of the evidence, among other facts mentioned, "that at the time the said Neff, as such constable, received said execution, the said Silas Work was the owner of personal property, subject to execution, of which the amount of said execution could have been made, and continued for a period of one month thereafter to be the owner of such property subject to execution." So, also, in the second instruction complained of, the court again informed the jury, in substance, that the relator could not recover, unless they found from the evidence, among other things, that at the time of the constable's receipt of said execution, and for one month thereafter, the execution defendant, Silas Work, was and had been the owner of personal property, subject to execution, "of which the amount of said execution could have been made."

It is insisted by the relator's counsel, that each of the said instructions, from which we have made the above quotations, was that far forth clearly erroneous, and would and probably did mislead the jury in arriving at their verdict. Coun-

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sel well say, as it seems to us, that "if Work had property, subject to execution, out of which any portion of the amount could have been made, it was the duty of the officer to levy" thereon. This objection is, we think, well taken as to each of the said instructions. If the execution defendant was the owner of any personal property subject to execution, within the constable's bailiwick, at and for one month after his receipt of the relator's execution, it was clearly the duty of the officer, under the law, to levy on such property and make what he could out of it, without regard to the question whether he could or could not make the amount of the execution out of such property. If the constable failed in the discharge of his duty in this regard, the relator was certainly entitled to recover in this action whatever damages he had sustained by reason of such failure; and the court ought to have so instructed the jury, for they might well have found from the evidence before them, that at and during the month specified, Work was the owner of personal property subject to execution, out of which a part, at least, of the amount of said execution could have been made. *The State, ex rel., v. Sandlin*, 44 Ind. 504.

Other objections are urged by the relator's counsel to the instructions of the court, as well to those given at the appellees' request as to those given of the court's own motion; but we deem it unnecessary for us to extend this opinion with an examination of those other objections. Enough has already been said, in this opinion, to show that the ends of justice will probably be subserved by a new trial of this cause; and, on such new trial, it is hardly possible, and certainly not probable, that the case will be given to the jury on the instructions now complained of. We are of the opinion that the court erred in overruling the motion for a new trial.

The files of this cause in this court show, that after the appeal was perfected, but before the case was submitted, the appellant's relator, Nicholas Shuckman, had died, and

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Herman Schnicker had been duly appointed administrator of said decedent's estate. For the sake of convenience, we have used the relator's name in this opinion; but the judgment of this court in this cause will be rendered and entered in the name of said administrator, as the appellant's relator.

The judgment is reversed, at the appellees' costs, and the cause is remanded for a new trial and for further proceedings not inconsistent with this opinion.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

No. 7714.

NAVE ET AL. v. HADLEY ET AL.

PLEADING.—*Demurrer for want of Capacity to Sue.*—A demurrer assigning the statutory cause of want of legal capacity to sue is proper only in cases where there is some legal disability, such as infancy, idiocy or coverture.

SAME.—*Demurrer for want of Sufficient Facts.*—Where a complaint by several plaintiffs fails to show a cause of action in all, a demurrer will lie upon the ground that it does not state facts sufficient to constitute a cause of action.

PRINCIPAL AND AGENT.—*Undisclosed Principal.*—*Promissory Note.*—An undisclosed principal may sue upon a promissory note payable to the agent, subject to all equities growing out of the transaction.

SAME.—*Note Payable to Cashier.*—The word "cash.," affixed to the name of the payee, indicates that the note is payable to the bank, and the bank may sue thereon as payee, the agent being a party to the action.

From the Hendricks Circuit Court.

C. C. Nave, for appellants.

E. G. Hogate and *R. B. Blake*, for appellees.

ELLIOTT, J.—This appeal brings before us the question of the sufficiency of the complaint of appellees against the

74	155
125	538

74	155
130	367

74	155
137	284

74	155
150	314
150	341

74	155
157	253

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appellants. It is therein alleged that appellants executed a promissory note, in which the payee is described as "N. T. Hadley, Cash."; "that the appellees were partners, doing business under the firm name of The Danville Banking Company; that said N. T. Hadley, to whom said note is payable, is the cashier of the said banking company, and was the cashier at the time the said note was executed, and is a member of said firm, and now sues in the name of Nicholas T. Hadley, together with his co-plaintiffs; that said note is now, and always has been, the property of the said Danville Banking Company."

One of the causes assigned by appellants' demurrer is, that the plaintiffs did not have legal capacity to sue. It is well settled that the second statutory ground of demurrer applies only to cases where the plaintiff is under some legal disability such as infancy, idiocy, coverture or the like. *Debolt v. Carter*, 31 Ind. 355; *Dale v. Thomas*, 67 Ind. 570. The argument appellants build upon this cause must fall, because it is utterly foundationless.

Another of the causes assigned by appellants' demurrer is that the complaint does not state facts sufficient to constitute a cause of action, and this presents the real question in the case. Appellants are correct in saying that, where a complaint by several plaintiffs fails to show a cause of action in all, it will be held bad on a demurrer assigning the fifth statutory cause. *Lipperd v. Edwards*, 39 Ind. 165; *Neal v. The State, ex rel.*, 49 Ind. 51. The question, whether this complaint does show a cause of action in all of the appellees, is therefore properly presented.

The complaint shows very clearly that N. T. Hadley, the payee in the note sued on, was the agent and partner of his co-plaintiffs, and that the note was executed to and received by him, as such agent and partner.

There is some conflict in the cases as to whether a principal may sue upon a promissory note, payable to the agent,

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which does not indicate or disclose the principal. The weight of authority is, however, pretty decidedly in favor of the doctrine, that the action may be maintained by the principal. *Rutland, etc., R. R. Co. v. Cole*, 24 Vt. 33; *Binney v. Plumley*, 5 Vt. 500; *Johnson v. Catlin*, 27 Vt. 87; *Fairfield v. Adams*, 16 Pick. 381; *The National Life Insurance Co. v. Allen*, 116 Mass. 398.

The descriptive word "Cash.," affixed to Hadley's name, indicates that he was acting in a representative capacity, and that it was in such capacity that the note was made payable to him. It is well settled that a note payable to the cashier of a bank is to be deemed payable to the bank, and that the bank may sue thereon as payee. *Baldwin v. The Bank, etc.*, 1 Wal. 234; *Garton v. The Union Bank*, 34 Mich. 279; *The First National Bank, etc., v. Hall*, 44 N. Y. 395; *Pratt v. The Topeka Bank*, 12 Kan. 570; *Fisher v. Ellis*, 3 Pick. 322. This is the doctrine of the case of *The Bank, etc., v. Wheeler*, 21 Ind. 90. In that case the endorsement was to "H. Early, Cashier," and by him under the same form to the plaintiff in that action, and the endorsement was held to be that of the bank. *Hays v. Crutcher*, 54 Ind. 260.

It has long been the doctrine of this court, that a principal may sue upon a contract made with the agent, although the principal was not named in the contract. In discussing this question in *Morrow v. Seaman*, 3 Blackf. 338, the court said: "The only true rule by which it can in all cases be determined who should be the plaintiff, in actions founded upon contracts, is, to ascertain with whom the contract has been made, or in other words, who has the legal interest in the contract; for he alone can complain that it has been broken and can enforce its performance."

Where the principal is not disclosed, the right to sue is hampered; for, if the party has acted upon the faith that the agent was the real party in interest, and was acting in his own behalf, then the principal receives his right of action,

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subject to all equities growing out of the transaction which may exist against the agent. Our decision in this case is not, however, affected by this consideration, for no equities are asserted to have existed against the agent.

It is true, as suggested by counsel, that where a note is payable to the agent of an undisclosed principal, he should in some way be brought into court, in order that the maker of the note may be fully protected against any real or pretended claim of such agent. We need not decide whether this rule should apply where the descriptive word "cashier" is added to the name of the payee, for the agent is here a party to the action. The agent joins in the action, and the judgment forever concludes him from asserting any interest different from that stated in the complaint. There can be no possibility of any successful assertion by Hadley of an interest in the note, different from that described in the complaint, and ascertained and fixed by the judgment. All who had an interest in the note were properly in court, and it was, therefore, in its power to render a judgment which should protect the interests of all, and finally determine all controversies respecting the promissory note which constituted the cause of action.

The complaint shows a complete cause of action in all of the appellees, and shows also that all proper parties were in court, and the demurrer was therefore properly overruled.

Judgment affirmed, with costs.

No. 7664.

RICHARDS, GUARDIAN, v. MCPHERSON ET AL.

VENDOR'S LIEN.—Mortgagee.—Notice.—In an action to enforce a vendor's lien, an averment in the cross complaint of a mortgagee, that "he had no notice" that the purchase-money or any part thereof was unpaid, is sufficient on demurrer.

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SAME.—Waiver.—Mortgage.—The holder of a vendor's lien, by taking a mortgage to secure the unpaid purchase-money, waived his vendor's lien, and, having satisfied his mortgage and taken the note of a subsequent purchaser in lieu of it, he can not revive such lien.

SAME.—Equitable Lien.—Abandoned Once, Abandoned Forever.—An equitable lien for purchase-money, once fairly and voluntarily abandoned, is abandoned forever.

MORTGAGE.—Satisfaction.—To constitute an effective satisfaction of a mortgage, it is sufficient to state by an entry upon the mortgage record, that "this mortgage is fully and completely satisfied."

SAME.—Interest.—A mortgage dated October 23d, 1875, with provision for interest at ten per cent. from date, bears interest at that rate until maturity only, and afterward at six per cent.

SAME.—Excess of Interest.—Reversal.—Remittitur.—A judgment which includes an excess of interest will be reversed, unless the excess be remitted by the appellee.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

J. H. Loudon and *R. W. Miers*, for appellees.

BICKNELL, C.—This was a suit by the appellant against the appellees, McPherson and wife and Robert Reed. After the appeal was taken, Robert Reed died, and John Reed, his administrator, was substituted in his place by consent. The material facts in the case are these: The appellant, as guardian, had sold certain real estate of his wards, and by order of the proper court had made a deed therefor to Scott & Campbell, the purchasers, and had taken a mortgage from them and their wives to secure part of the purchase-money. The deed and the mortgage were duly recorded. Afterward the appellant and Scott & Campbell and McPherson made an agreement, by virtue of which Scott & Campbell sold the land to McPherson, who gave his note to appellant for the unpaid purchase-money, and appellant satisfied the mortgage given to him by Scott & Campbell, by an entry upon the record thereof in these words: "This mortgage is fully and completely satisfied." This arrangement was made without the sanction of the court and without any application to the court in that behalf. Scott & Campbell made the deed for

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the land to McPherson's wife, who paid nothing, and who knew that her husband had paid nothing, and the deed was thus made, without the consent or knowledge of appellant. McPherson then borrowed five hundred dollars from the original appellee, Robert Reed, and, to secure the repayment thereof, he and his wife mortgaged the land to said Reed, and this mortgage was duly recorded, and said Reed had no notice when he took it that the original purchase-money of the land was unpaid. The value of the land did not exceed five hundred dollars, and McPherson was insolvent and without any property.

Upon the foregoing facts the appellant brought this suit to obtain a judgment upon the note given him by McPherson, and to make that judgment a vendor's lien upon the land as against McPherson and wife and Robert Reed. His complaint averred that Robert Reed took his mortgage with full knowledge of the unpaid purchase-money. McPherson and wife answered in denial. Robert Reed answered in two paragraphs. The first paragraph was in denial. The second was a cross complaint, setting up his mortgage from McPherson and wife, taken without notice, and praying judgment against McPherson, foreclosure against all the parties, and the sale of the land. McPherson and wife answered in denial of the cross complaint. The appellant answered the cross complaint in three paragraphs, the third of which was a denial merely. The first paragraph recited the principal facts aforesaid, averring that the deed to McPherson's wife was made without appellant's knowledge, and concluding thus: "Wherefore said Isabella McPherson had no title to said lands, and the said Reed was chargeable with notice of that fact, by reason of said deed and mortgage being of record as aforesaid, and there being no record of authority, and none in fact of said court, for any such change of title and security by said guardian."

The second paragraph of appellant's answer to Reed's

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cross complaint, after reciting the principal facts, averred that Scott & Campbell and McPherson “represented to appellant (which was also true in fact), that said deed had been executed to McPherson, and that thereupon appellant had satisfied his mortgage of record, but that the ‘satisfaction did not state that the purchase-money had been paid, but was in these words: Thereby acknowledge full and complete satisfaction of this mortgage;’ that afterward Scott & Campbell and McPherson destroyed the deed to McPherson, and executed said deed to his wife; wherefore ‘said Isabella McPherson had no legal title to said real estate, and could not create any lien.’ ”

There were no further pleadings. The cause was submitted to the court for trial upon the complaint, the cross complaint of Reed, and the exhibits and answers. The court found for the appellant against McPherson on his note, and that the same was given for purchase-money, and that Isabella McPherson took the title with full knowledge that the purchase-money was unpaid, and that McPherson was without property. The court found for the appellee Reed against McPherson for the money loaned, and that the mortgage held by Reed should be foreclosed as to all other parties.

The appellant moved for a new trial, because—

1st. The finding of the court was not sustained by sufficient evidence.

2d. The finding of the court was contrary to law.

3d. The damages assessed against McPherson were excessive.

4th. The amount of recovery assessed in favor of the appellee Robert Reed was too large.

The motion for a new trial was overruled, and judgment was rendered upon the finding, and for the foreclosure of Reed’s mortgage as to all the other parties, and for the sale of the land and the application of the proceeds, first, in pay-

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ment of costs, then in payment of Reed, and the surplus, if any, to be brought into court to be paid to the appellant.

The errors assigned by appellant are as follows:

First. In overruling appellant's demurrer to Reed's cross complaint.

Second. In sustaining Reed's demurrer to the first and second paragraphs of appellant's answer to Reed's cross complaint.

Third. In overruling appellant's motion for a new trial.

The second of these errors is not available, because there were no demurrers to the first and second paragraphs of appellant's answer to Reed's cross complaint.

As to the first alleged error, the appellant claims that Reed's cross complaint was insufficient, because it states that Reed "had no notice," etc., and the appellant claims that the averment ought to have been that Reed "had no knowledge," etc.; but the language of the cross complaint is, "At the time said Reed took said mortgage he had no notice that the purchase-money for said real estate was unpaid, or any part thereof." The demurrer to the cross complaint was properly overruled.

As to the motion for a new trial: If the appellant held a vendor's lien for purchase-money, he could not enforce it against a *bona fide* purchaser without notice. The evidence showed that the appellee Reed was such a purchaser. But, the appellant having taken a mortgage upon the land to secure the unpaid purchase-money, he thereby waived that vendor's lien. *Harris v. Harlan*, 14 Ind. 439. When he satisfied his mortgage and took the note of McPherson in lieu of it, he did not thereby revive that vendor's lien. An equitable lien for purchase-money, once fairly and voluntarily abandoned, is abandoned forever. *Mattix v. Weand*, 19 Ind. 151.

If a new vendor's lien arose in favor of Scott & Campbell against McPherson, and if that new lien passed to the appel-

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lant, with the McPherson note, that new lien could not be enforced against Robert Reed, who took his mortgage without notice of any purchase-money unpaid. The appellant's counsel suggest that a satisfaction of a mortgage is not effective, unless it states that the money is paid. But that is not so; it is sufficient to state that "this mortgage is fully and completely satisfied."

There was no error in this case, except in the amount found due to Reed upon McPherson's mortgage; that mortgage was given to secure "five hundred dollars, to become due and payable on or before the 23d day of October, 1876, with interest at ten per cent. from the date of this mortgage." The mortgage was dated October 23d, 1875.

Formerly, in Indiana, such a mortgage bore ten per cent. interest until paid. *Kilgore v. Powers*, 5 Blackf. 22. The finding of the court allowed interest to that extent, but *Kilgore v. Powers* was overruled, as to this point, in *Burns v. Anderson*, 68 Ind. 202, when this court, following the ruling in *Brewster v. Wakefield*, 22 How. 118, held that in such a case the writing bears interest at the rate expressed therein until the maturity thereof, and afterwards at six per cent. The court, in its finding, allowed interest at ten per cent. up to the date of the judgment. For this error, the motion for a new trial ought to have been granted, unless the appellee Reed remitted the excess. The excess might diminish the surplus payable to appellant under the judgment. He has, therefore a right to complain of it. The counsel for Reed, in their brief, offer "to remit the excess, say \$35," and we think such remission ought to be allowed. The judgment of the court below ought to be affirmed, if the appellee John Reed, administrator, etc., shall, within sixty days from this date, enter upon the record of this court a remittitur for the said sum of thirty-five dollars. Otherwise the judgment of the court below ought to be reversed.

PER CURIAM.—It is therefore ordered upon the foregoing

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opinion, that if the said appellee John Reed, administrator, etc., shall, within sixty days, enter upon the record of this court a remittitur for the said sum of thirty-five dollars, then the judgment of the court below shall be in all things affirmed, at the costs of said appellee, and that if such remittitur be not so entered, then the judgment of the court below shall be in all things reversed, at the costs of said appellee.

 No. 7683.

ALLEN v. SHANNON.

REAL ESTATE, ACTION TO RECOVER.—*Complaint before Justice.*—*Sheriff's Sale.*—In a complaint before a justice of the peace to recover possession of real estate, an averment, that the property sued for was sold to plaintiff in pursuance of a judgment of foreclosure, will be held to mean that it was sold by the sheriff as provided by section 635, 2 R. S. 1876, p. 263, and is sufficiently certain, after verdict.

SAME.—*Description of Premises.*—A description of premises in a deed as "a part of lot 235 in the city of Vincennes, according to Emmison and Johnson's survey, commencing fifty-five feet from the corner of said lot, on Sixth and Main streets, and fronting on Main street fifty-five feet, and running back the same width the full depth of said lot, one hundred and seventy-six feet," is not so vague as to render the conveyance void. A reference to the plat and survey may make it perfectly clear and definite.

SAME.—*Evidence.*—*Collateral Proceeding.*—*Decree of Foreclosure.*—*Default.*—In a collateral proceeding, the recital in a decree of foreclosure rendered upon the default of the mortgagors (the summons and return not being on file), that the defendants were duly summoned more than ten days before the first day of the term, is affirmative evidence that the court had acquired jurisdiction of the persons of the defendants.

SAME.—*Variance.*—*Sheriff's Return.*—Where a sheriff makes return that a writ issued to him upon a decree of foreclosure was satisfied by the sale, it must be deemed to have been so satisfied by a sale of the proper lot, notwithstanding there may be some discrepancy between the particular descriptions in the decree and return.

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SAME.—Defective Return.—A defective return of an execution or order of sale will not vitiate the title of a purchaser whose deed contains the same description as the decree, which was sufficient.

SAME.—Landlord and Tenant.—Under section 10, 2 R. S. 1876, p. 841, a successor to the title of a mortgagor by foreclosure, sale and sheriff's deed, is entitled to the same remedy as the latter to obtain possession of lands on the termination of the tenancy of a lessee.

From the Knox Circuit Court.

O. F. Baker, for appellant.

G. G. Reily, W. C. Johnson and W. C. Niblack, for appellee.

NEWCOMB, C.—The appellee sued the appellant before a justice of the peace, to recover possession of certain real estate in the city of Vincennes, which, it was alleged, the appellant had held as tenant of the appellee, but which tenancy had been terminated by notice to quit. On the filing by the defendant of a sworn answer that the title to the real estate was involved in the action, the cause was certified to the circuit court.

Trial by the court, which found for the plaintiff, and, over the defendant's motion for a new trial, rendered judgment of ouster and for sixty dollars damages.

The errors assigned are :

1. That the complaint does not set forth facts sufficient to constitute a cause of action.

2. That the circuit court erred in overruling appellant's motion for a new trial.

The complaint, to which no objection was made in the court below, states that the defendant became the tenant of Cyrus M. Allen, July 1st, 1874; that said lessor mortgaged the premises to the plaintiff; that said mortgage was foreclosed in the Knox Circuit Court; that said property, in pursuance to said judgment of foreclosure, was sold to the plaintiff, May 29th, 1875, and on July 5th, 1876, the sheriff of Knox county executed to plaintiff a deed therefor. It is

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further averred that written notice to quit was given by the plaintiff to the defendant three months prior to July 1st, 1878.

The objections urged to the complaint are, that it does not aver that the premises in controversy were sold by the sheriff to the plaintiff, nor that the sheriff was authorized to sell them ; that the description of the property is too indefinite and uncertain.

We think the averment as to the source of the plaintiff's title was sufficiently certain for a complaint before a justice of the peace, at least after verdict. The allegation, that the real estate was sold in pursuance of a judgment of foreclosure rendered in the Knox Circuit Court, must be held to mean that it was sold by the sheriff, as the statute provides that sales of real estate on such judgments shall be made by that officer. 2 R. S. 1876, p. 263, sec. 635.

The description of the premises in controversy, as given in the complaint, is as follows: "A part of lot 235 in the city of Vincennes, according to Emmison and Johnson's survey, commencing fifty-five feet from the corner of said lot on Sixth and Main streets, and fronting on Main street fifty-five feet, and running back the same width the full depth of said lot, one hundred and seventy-six feet." We can not, as a matter of law, say that this description is so vague as to render a conveyance by such description void. "A deed is not to be held void for uncertainty, if, by any reasonable construction, it can be made available." 3 Washburn Real Property, p. 401 ; *German Mutual Ins. Co. v. Grim*, 32 Ind. 249. A reference to the plat and to Emmison and Johnson's survey may make the description perfectly clear and definite.

On the trial the plaintiff offered and the court admitted in evidence, over the objections of the defendant, a certified copy of the foreclosure proceedings and judgment in the case of the plaintiff against Cyrus M. Allen and wife ; also the certified copy of the decree and order of sale issued to

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the sheriff, with his return thereon; and the deed of the sheriff to the plaintiff.

The only objection made to the introduction of the foreclosure judgment was, that the summons and the sheriff's return thereto were not in the record, the clerk certifying that they were not on file. The judgment was by default, and it is urged that it does not appear that the court acquired jurisdiction of the persons of the mortgagors. There is nothing in this objection. In the absence of evidence to the contrary, jurisdiction of courts of superior jurisdiction is presumed, where the judgment comes collaterally in question. *Kinnaman v. Kinnaman*, 71 Ind. 417, and cases there cited. But in the case in hand it is not necessary to resort to this presumption, for the record recites that the defendants were duly summoned more than ten days before the first day of the term. This, in a collateral proceeding, is affirmative evidence that the court had acquired jurisdiction of the persons of the defendants.

In the foreclosure judgment and the sheriff's deed, the premises are described as in the plaintiff's complaint, with this addition, after giving the frontage and depth of the part of the lot conveyed, "and including the brick house thereon situate."

The sheriff's return is particularly objected to, on the alleged ground that it shows that he sold a different piece of ground from the one described in the decree he was commanded to execute. In his return, the sheriff stated that he first offered the rents and profits for a term not exceeding seven years, giving the same description as that contained in the decree. Having received no bid therefor, the sheriff certifies: "I then and there, in like manner, offered at public auction the fee simple of part of lot two hundred and thirty-five in the city of Vincennes, according to the survey and plat of said city by Emmison and Johnson, and commencing fifty-five feet from the corner of said lot on Sixth

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and Main streets, and running back the same width the full depth of said lot, one hundred and seventy-six feet, and including the brick house thereon situate." Then, after reciting the sale of the fee simple to the plaintiff, the receipt of the purchase-money, and the execution of a certificate of purchase, the sheriff adds: "and I return this writ fully satisfied." Taking the return as a whole, we think it sufficiently appears that the sheriff sold the property he was directed by the decree to sell. He had no authority to offer or sell any other until that described in the decree should be exhausted. *Ewing v. Hatfield*, 17 Ind. 513. He mentions the brick house on the premises as it is mentioned in the decree and deed, and certifies that by the sale and the receipt of the purchase-money the writ was satisfied. It could be satisfied only by the voluntary payment of the judgment, or by a sale of the specific property described in the decree of foreclosure; and when the sheriff made return that the writ was satisfied by the sale, it must be deemed to have been so satisfied by a sale of the proper lot, notwithstanding there may be some discrepancy between the particular descriptions in the decree and in the return, especially as the return, in other respects, clearly refers to the same part of the lot described in the decree.

The deed, as we have stated, contained the same description as the decree. That being sufficient, a defective return does not vitiate the title of the purchaser. He can not, in such case, be prejudiced by a defective return or the want of a return to the execution or order of sale. *Doe v. Heath*, 7 Blackf. 154; *The State, ex rel., v. Salyers*, 19 Ind. 432.

The last objection to be noticed is, that it was not proven that the defendant was in possession of the premises at the commencement of the action. In this the appellant is mistaken. The evidence on that point was amply sufficient. The plaintiff, as successor to the title of Cyrus M. Allen, Sr., was entitled to the same remedy as the latter to obtain

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possession on a termination of the tenancy of the lessee.
2 R. S. 1876, p. 341, sec. 10.

We find no error in the record, and the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellant.

No. 7205.

**THE EVANSVILLE AND CRAWFORDSVILLE R. R. Co. v.
BARBEE.**

74	169
134	600

SUPREME COURT.—*Appeal within one Year from July 2d, 1877.*—An appeal to the Supreme Court taken June 27th, 1878, from a judgment rendered May 14th, 1877, was within one year from the time the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, took effect, and was in time, as such act took effect July 2d, 1877.

STATUTE.—*Speaks from time of Taking Effect.*—An act of the General Assembly speaks, not from the time of its approval, but from the time it took effect.

RAILROAD.—*Killing Stock.*—*Highway Crossing.*—*Duty to Fence.*—*Cattle-Pits.*—It is as much the duty of a railroad company to fence against animals on a highway as against animals in adjoining fields or woods, and proper cattle-pits at highway crossings are necessary, to prevent animals passing from the highway on to the railroad track.

SAME.—*Instruction.*—Instructions, in effect, that if animals went on the railroad track at a crossing of the highway, and were killed some distance from the highway, the railroad company would not be liable upon the ground of the want of a fence, were properly refused.

SAME.—*Harmless Error.*—Where a verdict is clearly in accordance with the evidence, no harm can result to the appellant because a charge given to the jury was not applicable to the evidence.

From the Vigo Circuit Court.

J. G. Williams, for appellant.

A. B. Carlton and J. E. Lamb, for appellee.

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MORRIS, C.—This action was brought by the appellee to recover the value of a mule and colt, alleged to have been killed by the appellant.

The complaint is in two paragraphs. The first charges that, on the 12th day of May, 1873, the appellant killed a mule and colt, the property of the appellee, by running over them a locomotive, in Vigo county; that the appellant's road was not, at the point where the mule and colt got upon the same, securely fenced. The second paragraph charges the appellant with negligently killing the mule and colt, by negligently running its locomotive and cars upon them.

The appellant answered the complaint by a general denial, and three special paragraphs. No question is made or raised upon the special paragraphs of the answer, and they will not be further noticed.

The cause was submitted to a jury. Verdict on the first paragraph of the complaint, and judgment for the appellee.

The appellant moved the court, in writing, for a new trial upon the following grounds:

1st, because the verdict is contrary to law; 2d, because the verdict is contrary to the evidence; 3d, because the court erred in refusing to give the first instruction asked by the appellant; 4th, because the court erred in refusing to give the second instruction asked by the appellant; and, 5th, because the court erred in giving, of its own motion, the fifth instruction.

The motion for a new trial was overruled, and the appellant excepted. The error assigned is that the court erred in overruling the appellant's motion for a new trial.

The appellee has filed a motion here to dismiss the appeal, on the ground that it appears, upon the face of the record, that the judgment was rendered May 14th, 1877, and the appeal taken June 27th, 1878, more than one year after the judgment was rendered. The motion is based upon the act approved March 14th, 1877, Acts 1877, p. 59, which pro-

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vides that "Appeals in all cases hereafter tried must be taken within one year from the time the judgment is rendered; in all cases, heretofore tried, must be taken within one year from the time this act takes effect." The act took effect July the 2d, 1877. The question is, is this law to be construed as speaking from the time of its approval or from the time it took effect? The question has been settled by this court, in a case between the parties to this suit. *The Evansville, etc., R. R. Co. v. Barbee*, 59 Ind. 592.

WORDEN, J., says: "We think the law must be construed to speak from the time it took effect, as a will speaks from the time of the death of the testator; and that the words 'hereafter' and 'heretofore' have reference to that period of time."

The appellant's road runs north and south through the county of Vigo. It is crossed by the Louisville road, a highway some sixty feet in width. The highway, as it approaches the point of crossing from the north, runs on the west side of the railroad, and near to and almost parallel with it, for some distance. There is a fence on the west side of the railroad, and the Louisville road, for some distance north of the point of crossing, runs between this fence and the railroad. There is no fence on the east side of the railroad at the crossing. The testimony further shows that on or about the 12th of May, 1873, the appellee's mule and colt had broken out of a neighbor's field, where they had been pasturing, and had, without the appellee's knowledge, got on the west side of and near to the appellant's road, and north of said crossing. As the morning train came from the north, the animals became frightened, ran along the Louisville road until they came to the track of the railroad, and then turned south, passing from the highway along the track of the railroad, and on the west side of it, and running south some seventy-five or a hundred feet, until they came to a culvert and cattle-pit, at which point they

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were struck by the appellant's locomotive. One of the animals was killed, and the other so injured that it died the next day. The cattle-guard on the south side of the crossing was from seventy-five to one hundred feet distant from the crossing.

It is not contended by the appellant that the evidence does not tend to support the verdict, but it is insisted that the court erred in refusing to charge the jury as requested by it, and in the charge given by the court of its own motion. The appellant's counsel says: "The questions to be discussed grow out of the refusal of the court below to give the first and second charges asked by the appellant, and the giving by the court, on its own motion, instruction designated as the fifth."

The instructions asked by the appellant were as follows:

"1st. If you believe from the evidence in this case, that the mule and colt of the plaintiff went upon the track or right of way of the defendant at a point where the highway crosses said railroad track and right of way, then you should find for the defendant on the first paragraph of the complaint.

"2d. You must inquire at what point the animals went upon the track or right of way of defendant, and not at what point the animals were killed. If the animals went on at a crossing of the highway, even if they were killed some distance from the highway, the defendant would not be liable upon the ground of the want of a fence."

We think the above instructions were properly refused. They assume that, if an animal passes from a highway at the point where it crosses a railroad onto the railroad track, and, because of the absence of cattle-guards, wanders upon the track and is killed, the company is not liable. The animals were rightfully upon the highway, and it was the duty of the appellant, by the construction of cattle-pits or guards and fences, properly and conveniently located, to prevent them

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from wandering from the highway upon its track and right of way. It is as much the duty of the appellant to fence against animals on the highway as against animals in adjoining fields or woods. Proper cattle-pits at highway crossings are intended to prevent animals passing from the highway onto the railroad track. If, as in this case, they are placed seventy-five or one hundred feet distant from the crossing, they will not accomplish the purpose and object for which they are required. *The Indianapolis, etc., R. R. Co. v. Irish*, 26 Ind. 268; *The Pittsburgh, etc., R. R. Co. v. Ehrhart*, 36 Ind. 118; *The Indianapolis, etc., R. R. Co. v. Bonnell*, 42 Ind. 539.

The appellant contends, however, that the cattle-guard in this case was properly located. We have examined the cases to which its counsel refers, and think they do not support his conclusion. In the case of *The Indianapolis, etc., R. R. Co. v. Bonnell, supra*, the pits were seventy-five feet from the center line of the highway. The court say: "We do not think a railroad can be regarded as securely fenced where the cattle-guards are placed so far apart as to leave an open space on both sides." Here the cattle-guard was from seventy-five to one hundred feet from the south side of the travelled highway.

The fifth charge given by the court, of its own motion, is as follows:

"If you find that the animals got upon the track where the public highway crosses the defendant's railroad track (and at a point where the defendant was not bound to fence), and you find that after the animals had entered upon the defendant's road at the crossing, and then ran south along defendant's road to the point where the animals were killed, and you find further, that the animals were killed at a point where it was the duty of the defendant to fence its road, and could have done it, and did not, the defendants are liable under the first paragraph of the complaint."

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We think, in view of the evidence in the case, that there was no error in giving this charge, of which the appellant can complain. The verdict was clearly in accordance with the evidence, and no harm could result from the charge given, of which the appellant could complain. *Felkner v. Scarlet*, 29 Ind. 154; *Herbert v. Drew*, 32 Ind. 364.

The judgment should be affirmed.

PER CURIAM.—It is ordered, that, upon the foregoing opinion, the judgment be, and the same is hereby, affirmed in all things, at the costs of the appellant. Cause remanded for further proceedings.

No. 9472.

THE STATE, EX REL. ADAMS, *v.* PETERSON.

74	174
150	430
74	174
161	251

PROSECUTING ATTORNEY.—*Thirty-fifth and Fortieth Judicial Circuits.—*
Statute Construed.—Waiver.—Noble, DeKalb and Steuben counties composed the Thirty-fifth Judicial Circuit prior to March 21st, 1879, the judge and prosecutor both residing in Noble. In 1878 the relator, a resident of Steuben, was elected prosecuting attorney of said circuit, for the two years commencing October 28th, 1879. By the act of March 21st, 1879, it was provided that, on and after its passage, Steuben and DeKalb should constitute the Fortieth Judicial Circuit until October 1st, 1880, when they were again to become a part of the Thirty-fifth Circuit, and that the prosecutor-elect of the Thirty-fifth Circuit should be the prosecutor of the Fortieth on and after his term commenced. Under said act, the relator was appointed prosecutor of the Fortieth Circuit, and served in that capacity till October 28th, 1879, when he qualified under his election, and continued to serve and designate himself as prosecutor of the Fortieth Circuit till October 1st, 1880, and after that date so styled and signed himself, and received his compensation. At the October election, 1880, the defendant was elected prosecutor of the Thirty-fifth Circuit, but received no commission till February, 1881, when he qualified and entered upon the duties of his office.
Held, that said act created a new circuit, in which the office of prosecutor was vacant, which the Governor had a right to fill.

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Held, also, that, by force of said statute, the relator, on qualifying under his election, became the prosecutor of the Fortieth Circuit so long as it lasted, and thereafter of the Thirty-fifth Circuit until October 28th, 1881, when the defendant's term will commence.

Held, also, that the fact that the relator wrongly claimed to be, and designated himself as, the prosecutor of the Fortieth Circuit, after it ceased to exist, constituted no waiver of his title by election and statute to the office of prosecutor of the Thirty-fifth Circuit.

INFORMATION.—*Prosecuting Attorney His Own Relator.*—The prosecuting attorney may prosecute an action upon his own relation against a person who unlawfully intrudes into the office of prosecuting attorney.

From the DeKalb Circuit Court.

J. A. Woodhull, for appellant.

W. L. Penfield, for appellee.

WOODS, J.—The question in this case is whether the relator and appellant, George B. Adams, or the appellee, Henry C. Peterson, is the prosecuting attorney of the Thirty-fifth Judicial Circuit of the State. There is no material dispute in reference to the facts on which the decision must rest. We give a summary of them:

Prior to March 21st, 1879, the Thirty-fifth Judicial Circuit was composed of the counties of Noble, DeKalb and Steuben. John W. Bixler, a resident of Noble county, was at that time the prosecuting attorney of the circuit, entitled by his election and commission to hold the office until October 28th, 1879. At the general election of 1878, the relator, Adams, a resident of Steuben county, was duly elected, and on the 24th day of October, 1878, was duly commissioned, to succeed Bixler in said office, and to hold the same for the period of two years, to wit, from October 28th, 1879, until October 28th, 1881.

By an act of the Legislature, approved March 21st, 1879, the counties of Steuben and DeKalb were declared to constitute the Fortieth Circuit. Among the provisions of that act are the following:

“Sec. 5. The Governor shall appoint a judge and prosecuting attorney for said circuit, who shall receive and be

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paid such salaries as are now paid to other judges, and prosecuting attorneys.

“Sec. 6. The prosecuting attorney elect, of the Thirty-fifth Circuit, whose term of office has not yet commenced, and who resides in the county of Steuben, shall be the prosecuting attorney of the Fortieth Judicial Circuit, after he qualifies and his term commences.

“Sec. 7. The prosecuting attorney, appointed by the Governor, shall hold his office until the prosecuting attorney elect qualifies, and his term commences.

“Sec. 9. * * * There is therefore an emergency for the immediate passage of this act, and the same shall be in force from and after its passage: *Provided, however,* That the circuit thus formed shall only continue until the 1st day of October, 1880, when said counties of DeKalb and Steuben shall then become and form a part of the Thirty-fifth Judicial Circuit of the State of Indiana, and the courts therein shall thereafter be held, as they are now required by law, to be held.”

By the 2d, 3d and 4th sections the terms of court in said counties were fixed, and so fixed as that the courts of the two circuits were, or were liable to be, in session at the same time.

Upon the passage of this act, the Governor appointed and commissioned said Adams as the prosecuting attorney for said Fortieth Circuit, and he, accepting said commission, qualified and entered upon and continued in the discharge of the duties of said office, until October 28th, 1879, when he qualified under the commission issued to him by virtue of his said election, taking and endorsing the proper oath of office on said commission, and giving bond in the sum of \$5,000, to the approval of the judge of the Thirty-fifth Circuit. After thus qualifying, he continued to prosecute the pleas of the State in the counties of Steuben and DeKalb, until October 1st, 1880; and, to all indictments and informations, and in all official transactions, requiring his official signature, he continued to sign and to designate himself as

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the "Prosecuting Attorney of the Fortieth Circuit," and as such drew and receipted for his salary and the fees appertaining to said office in said circuit; and, on February 3d, 1881, still styling and signing himself as prosecuting attorney of said Fortieth Circuit, and not of the Thirty-fifth, he prosecuted, in the Steuben Circuit Court, the pleas of the State in the case of the State of Indiana against James N. Carpenter. See *Carpenter v. The State*, 72 Ind. 331.

The Hon. Hiram S. Tousley, a resident of Noble county, was judge of the Thirty-fifth Circuit, and, after the passage of said act, continued to serve as such judge in said county of Noble, and is still judge of said circuit. Said Bixler held his office of prosecuting attorney, and discharged the duties thereof, in Noble county, until October 28th, 1879, when the Governor appointed David Perew the prosecuting attorney for the Thirty-fifth Circuit, and, a contest having arisen between Bixler and Perew over their respective claims to said office, the same was carried into said court, and there settled by agreement of the parties, in favor of Perew, who thereafter discharged the duties of said office in said county, so long as it remained a separate circuit, and until October 28th, 1880. At the general election in October, 1880, the appellee was elected prosecutor for the Thirty-fifth Circuit, and claimed a commission as such for a term commencing October 28th, 1880, but received no commission until February 10th, 1881, when one was issued to him, under which he qualified and gave bond, and was recognized by the judge of the circuit as the lawful prosecutor, and entered on the duties of the office.

We find no difficulty in deciding this dispute, in accordance with what seems to us to have been the plain legislative intention, as manifested in the act whereby the Fortieth Circuit was created.

In the case of *Carpenter v. The State*, *supra*, we have al-

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ready held that said circuit ceased to exist on the 1st of October, 1880, as in the act it was declared it should. Upon the creation of that circuit, the existing judge and prosecutor being residents of Noble county, there were vacancies in the offices of both judge and prosecutor in the new circuit, to be filled by appointment. Adams had been elected to succeed Bixler, but it was some months yet before his term should begin. He resided in Steuben county, and, for the evident purpose of saving his right to the office to which he had been elected, the 6th and 7th sections of said act were embodied therein. The Governor appointed Adams to fill the vacancy in the prosecutorship, for the time which must elapse before his term by election could begin; but when that term did begin, and he had qualified under his commission, granted in pursuance of his election, his rights were just the same as if he had not been appointed to fill the preceding vacancy. He then entered, by right of election, upon a full term of two years, running from that date; but, by force of the 6th section quoted, *supra*, he was to be the prosecuting attorney of the Fortieth Judicial Circuit after he had qualified and his term had commenced; and this clearly means that, by virtue of his election and by force of said enactment, he was to be the prosecutor of the new circuit, so long as the same should last, and thereafter of the original Thirty-fifth Circuit, until October 28th, 1881, when his term will expire by limitation, and the term of the appellee will begin. By force of this provision, though elected and commissioned as prosecutor of the Thirty-fifth Circuit, he was in fact and in law the prosecutor of the Fortieth Circuit, and it was proper, that during the existence of that circuit and while doing the duties of his office therein, he should sign and designate himself as the prosecutor thereof, and as such should draw his salary and fees. To say the least, there was no harm in his so designating himself, and the fact that he did so, under

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the circumstances, constitutes no evidence of an abandonment of his right to the office by election.

What the legal status of the case in Noble county was while the Fortieth Circuit existed, and what the merits of the respective claims of Bixler and Perew during that time, we need not inquire. The clashing of the terms of court in the two circuits made it impracticable in fact, if it was not impossible in law, that one prosecutor should serve in both the circuits, and doubtless it was on this account that it was provided that, for the time being, Adams should be the prosecutor in the new circuit, wherein he resided. After October 1st, 1880, he was prosecutor of the Thirty-fifth Circuit, and for all of the counties, as much as Judge Tousley was judge thereof; and the fact that, in February, 1881, in the case of *Carpenter v. The State, supra*, he wrongly claimed to be, and signed his name officially as, the prosecutor of the Fortieth Circuit, did not make him any the less the sole lawful prosecutor of the Thirty-fifth Circuit. If, as he seems to have supposed, the Fortieth Circuit had still remained in existence, he would still have been the prosecutor thereof, under the law by which that circuit was created, and, as already said, did and could do no harm by so subscribing himself; and equally harmless, in respect to his title to the office, is the misdescription of his official title, made, as it was, under a mistake of law. In all these transactions, he has done nothing inconsistent with his strict legal rights and duty, unless it may be in the designation of his office in the respects stated, but these mistakes, if they can be called such, and they were certainly nothing more, in no manner affected injuriously either public or private rights, and should not be deemed to affect his right to the full term of office for which he was elected and commissioned.

The appellee has assigned cross errors and under these insists that the information in the case is insufficient, and that

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Adams can not prosecute the action on his own relation as prosecuting attorney. The code provides as follows :

“Sec. 749. An information may be filed against any person or corporation in the following cases : *First.* When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or any franchise within this State, or any office in any corporation created by the authority of this State.

“Sec. 750. The information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court, or other proper authority ; or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation, which is the subject of the information.

“Sec. 751. The information shall consist of a plain statement of the facts which constitute the grounds of the proceedings, addressed to the court.”

It is unnecessary to determine whether strictly the relator in this case should have presented the information in his official character, or simply as an individual claiming the office. If the latter was the correct mode, then the words “prosecuting attorney,” etc., in the information, were mere surplusage, and might have been stricken out, but the refusal of the court to strike them out on the appellee’s motion constitutes no available error. The information was sufficient in substance. It showed the relator’s election and eligibility to the office, his commission to hold the office for two years from October 28th, 1879, that on that day he qualified and gave bond, and that on the 1st day of March, 1881, the appellee unlawfully intruded himself into the office, and at the filing of the information was still usurping and holding the same against the relator and refusing to surrender.

The answer of the appellee to this information contained a statement in greater detail of the facts hereinbefore stated, but nothing inconsistent therewith.

Ware *et al.* v. The State, *ex rel.* Long *et al.*

The demurrer of the appellant to this answer should have been sustained.

The judgment is reversed, with costs and with directions to sustain said demurrer.

No. 8093.

WARE ET AL. v. THE STATE, EX REL. LONG ET AL.

STATUTE OF LIMITATIONS.—*Auditor of County.*—*Congressional Township School Fund.*—*Loan to Himself.*—*Bond.*—*Sureties.*—Where the auditor of a county drew a warrant in his own favor for one thousand dollars, as a pretended loan from the congressional township school fund, and received the money, a cause of action at once accrued on his bond, and a suit thereon, commenced more than three years thereafter, is barred by section 211 of the code.

SAME.—*County Commissioners.*—*Concealment.*—The right of action does not depend upon a knowledge of the facts by the county commissioners, but upon the existence of the facts themselves. If the facts constituted a breach of the bond, the statute commenced to run, not when the breach was discovered, but when it occurred.

SAME.—*Failure to Discover.*—*Silence of Party Liable.*—A failure to discover a cause of action does not, like its concealment, suspend the statute; and the mere silence of the party liable is not enough, but something must be done tending to prevent discovery.

AUDITOR OF COUNTY.—*Not Trustee of Congressional Township School Fund.*—The auditor of the county is not a trustee of the congressional township school fund.

SAME.—*Void Loan.*—A loan of one thousand dollars, made by the auditor of a county to himself, is void, although all the requirements of the statute have been observed.

From the Howard Circuit Court.

R. Vaile and *J. F. Vaile*, for appellants.

J. O'Brien, for appellees.

BEST, C.—This suit was instituted by the State, on the

74	181
149	243
74	181
164	138

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relation of the Board of Commissioners of Howard county, Indiana, against Isaiah C. Ware as principal, and John M. Leach, David Greeson, Henry Brunk, Jesse Ware and William T. Mannering, sureties, upon the official bond of said Isaiah C. Ware, as auditor of said county. It is averred that said Isaiah C. Ware was duly appointed auditor of Howard county, Indiana, to serve from the 1st day of March, 1875, until the 1st day of March, 1876, and that he, with his co-appellants as his sureties, on the 6th day of March, 1875, executed his bond and at once entered upon the duties of said office; that said Isaiah C. Ware, on the 24th day of January, 1876, as auditor of said county, made to himself a pretended loan of one thousand dollars of the congressional township school fund, executed his mortgage, drew his warrant, and received upon it from the treasurer of said county said sum of money; that said Isaiah C. Ware violated the conditions of his bond in these particulars, viz.:

1st. In loaning to himself one thousand dollars of the congressional township school fund.

2d. In not causing an appraisement of the realty embraced in said mortgage to be made by disinterested freeholders of the neighborhood before making said loan.

3d. In not procuring from the clerk and recorder of Howard county, Indiana, certificates that there were no liens or encumbrances upon said realty before said mortgage was made.

It was further averred that, after said Ware's term of office expired, his successor instituted a suit upon said mortgage, obtained a foreclosure, sold the property, and realized from the sale enough to pay all costs and to reimburse said fund, except \$468.05, for which, with interest thereon, judgment was demanded.

No step was taken against Isaiah C. Ware; John M. Leach was defaulted; and the other defendants demurred, for want of facts, to the second and third breaches assigned. These demurrers were sustained, and the appellee excepted. There-

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upon the defendants answered, first, in denial, and, second, that the cause of action did not accrue within three years before the commencement of the suit. A demurrer for want of facts was filed and overruled to the second paragraph of the answer, to which the appellee excepted. A reply was filed, first, in denial, and, second, that the cause of action was concealed by said Isaiah C. Ware, until a period within three years before the commencement of the suit.

The issues thus formed were submitted to the court for trial, with a request that the court state the facts and its conclusions of law thereon. This was done. The facts found are, in substance, as follows: On the 6th day of March, 1875, Isaiah C. Ware as principal, and the other defendants as sureties, naming them, executed to the State of Indiana their bond for \$2,000, conditioned that said Isaiah C. Ware should faithfully perform the duties of auditor of Howard county, Indiana; that said Isaiah C. Ware was auditor of said county from the 6th day of March, 1875, until the 6th day of March, 1876; that, during this time, said Ware, as auditor, loaned to himself, as an individual, one thousand dollars of the congressional township school fund held by said county; that, to secure said loan, said auditor and his wife executed a mortgage to the State of Indiana for the use of said fund, upon a lot in Kokomo, in said county; that afterward proceedings were instituted to foreclose said mortgage, and, on the 11th day of October, 1878, a judgment for \$1,157.05 was obtained; that, on the 3d of November, 1878, there was due upon said judgment \$1,266.92, at which time said property, upon said decree, was sold for \$800; that said sum was placed to the credit of said fund, and, on December 7th, 1879, the auditor placed to the credit of said fund \$466.52, which fully reimbursed it; that said mortgage matured five years after date, was executed on January 24th, and recorded January 31st, 1876; that said auditor was not guilty of any acts of concealment as to the

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existence of said mortgage, but the commissioners of said county had no actual knowledge of its existence, until the June term, 1876, at which time they made no order to protect or secure the investment; that this action was commenced on the 30th of January, 1879, and that a warrant was drawn by said Ware, as auditor, upon the treasurer of said county, for the payment of said loan, on the 24th of January, 1876, and that the treasurer of said county paid said order on the same day.

The conclusions of law by the court are as follows:

“1st. That the loan (so-called) by Isaiah C. Ware, whilst acting as auditor of Howard county, to himself, of the school funds, was illegal and void.

“2d. That the action of the board of commissioners, in causing the mortgage (so-called) to be foreclosed and the property sold, was an act for the benefit of the defendants in this case, and the amount received therefrom lessens the liability in this case, and therefore they have no right to complain thereof.

“3d. That the statute of limitations has not barred this case; that the cause of action did not accrue to the plaintiff until the payment was made by her to the school funds of the amount received by said Ware, which was less than three years last passed.

“4th. That the plaintiff is entitled to recover of the defendants in this case the sum of \$483.26, without relief from valuation or appraisement laws, and that judgment is rendered therefor.

C. N. POLLARD.”

To all and each of these conclusions of law the defendants excepted, and final judgment was rendered against them.

They appeal, and assign as error, among others, that the court erred in its conclusions of law upon the facts found. It is conceded that the appellee was entitled to a judgment upon the facts found, unless the action was barred by the statute of limitations. This depends upon the time when

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the cause of action sued upon accrued. Section 211 of the code provides that "The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards: * * * All actions against a sheriff or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty,—within three years."

The facts found are that the auditor, under pretence of loaning \$1,000 of the congressional township school fund, drew his warrant upon the treasurer of the county, and received from him of such fund said sum, on the 24th day of January, 1876, and this suit was commenced on the 30th day of January, 1879, more than three years thereafter.

The above statute applies to this case, and if the cause of action accrued when the warrant was drawn and the money obtained, the action is barred. The misappropriation of the money was complete when it was received, and nothing has since been done, or omitted to be done, by the auditor, that either created or matured a cause of action against him and his sureties upon his bond. All that he did to render them liable was done at that time, and no reason has been suggested, nor do we know of any, why an action could not have been commenced at once against them. If it could have been done, it was because the cause of action had accrued, as no right of action arises until the cause of action accrues. Angell Limitations, p. 37, 6th ed. Nor is this conclusion avoided by the fact that the county commissioners had no personal knowledge of the misappropriation of the money till within three years before the commencement of the suit. The right of action did not depend upon a knowledge of the facts out of which it arose, but upon the existence of the facts themselves. If the facts constituted a breach of the bond, the statute commenced to run, not when it was discovered, but when it occurred. *Wilcox v.*

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Executors of Plummer, 4 Pet. 172 ; *The Governor, etc., v. Gordon*, 15 Ala. 72 ; *Potter v. Smith*, 36 Ind. 231.

A failure to discover a cause of action does not, like its concealment, suspend the statute. They are not the same. The former may occur without the fault of the person liable to the action, while the latter can not. Nor is the mere silence of the person liable enough. Something must be done tending to prevent discovery. *Stanley v. Stanton*, 36 Ind. 445 ; *Wynne v. Cornelison*, 52 Ind. 312.

This action is for a liability incurred by the auditor in doing an act in his official capacity, and is, therefore, within the terms of the statute.

The appellee, however, insists that the auditor was the trustee of this fund ; that when such relation exists the statute does not run till his term of office expires, and as Ware's term of office did not expire till the 6th of March, 1876, this case is not within the statute.

From the premises assumed, the conclusion is a logical one. But is the premise true, that the auditor sustains the relation of trustee to the congressional school fund? No statute is cited, nor do we know of any, making him a trustee of this fund. He has authority to loan it, but is not the custodian of it, and has no control over the money itself. His bond is not executed to secure its keeping nor its actual disbursement at any time during, or at the expiration of, his term. Indeed, he has no authority to receive it, nor is it contemplated that any portion of it shall go into his custody, but, on the contrary, the law provides that the county treasurer shall receive and disburse such fund upon the warrant of the auditor. *Davis v. The State, ex rel.*, 44 Ind. 38.

The auditor, having no authority to receive any portion of said fund, can not, upon receiving it, be converted into a trustee so as to make his sureties liable upon his bond. Their undertaking was not that he would pay money, but that he would not wrongfully loan any of said fund. The duty to

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loan this fund was imposed upon him ; it was an official act and but for the liability incurred in the discharge of it the sureties would not be liable at all. It was either right or wrong to loan the money ; if right no liability was incurred, if wrong the liability was then incurred. For this alone are they liable.

To treat him as trustee, and make them liable as his sureties, is to waive the wrong, affirm the loan, and make them answerable for his failure to pay the money. This can not be done. If liable, they are liable for him as auditor and not as trustee.

Nor do we think the statute was suspended until the county reimbursed the fund. It did not sustain the relation of surety to the auditor, but practically that of beneficiary of the fund. All the loss it ever sustained was when the money was misappropriated, and the only cause of action it ever possessed then arose. Checking the money from one fund to another conferred no right, and its neglect could not extend the time within which an action could be brought.

For these reasons, we are of opinion that the cause of action accrued when the auditor obtained the money on his warrant, and that the action is barred by the statute.

The appellee has assigned as cross errors, that the court erred in sustaining demurrers to the second and third breaches of the complaint, and in overruling the demurrer to the second paragraph of the answer.

There was no error in either of these rulings. Aside from these breaches, the complaint averred that the bond was broken by the auditor, in making a pretended loan of \$1,000 of the congressional township school fund to himself.

In the second breach, it was averred that this loan was made without causing the property taken as security to be appraised ; and, in the third, it was averred that this loan was made without procuring from the clerk and recorder of the county certificates that the property was unencumbered.

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The auditor had no authority whatever to make such pretended loan, either with or without a compliance with these requirements ; and, therefore, these averments added nothing to what had already been alleged. The averment that he made such loan to himself could not be made stronger by averring that he had not complied with these requirements of the statute ; as a loan to him would, in such case, be regarded as void, though all these requirements had been observed. The demurrer to the second paragraph of the answer was correctly overruled.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, and the cause remanded, with instructions to render a judgment upon the facts found for appellants, at the costs of appellee.

No. 9432.

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CRIMINAL LAW.—*Felony.*—*Affidavit and Information.*—*Statute Construed.*—In a prosecution for felony, under section 1 of the act of March 29th, 1879. Acts 1879, p. 143, the averments in the information, “that an indictment was found by the grand jury and quashed, and that said grand jury is not now in session,” are insufficient, under either the first or second clause of said section.

From the Allen Circuit Court.

S. M. Hench and *H. C. Hanna, Jr.*, for appellant.

D. P. Baldwin, Attorney General, and *W. S. O'Rourke*, Prosecuting Attorney, for the State.

WOODS, J.—This was a prosecution by affidavit and information, against the appellant and one Emanuel Fox, for

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robbery. Motion to quash the information overruled, and exception. Trial of the appellant, conviction and judgment.

Error is assigned upon the overruling of the motion to quash.

The portion of the information which was designed to show the authority or power of the court to try the appellant upon affidavit and information, without indictment, was as follows: "And this court is further informed, that said Emanuel Fox and August Iter, named in the affidavit of John Case, herewith filed, are now in the custody of the sheriff of Allen county, in the State of Indiana, and confined in the jail of said county, on a charge of robbery, as set forth in the affidavit of John Case; and that an indictment was found by the grand jury and quashed, and that said grand jury is not now in session."

The statute on the subject provides, among other things, "That felonies may be prosecuted in the circuit and criminal courts, by affidavit and information, in the following cases:

"*First.* When any person is in custody on a charge of felony, and no grand jury is in session.

"*Second.* When an indictment has been found by the grand jury, and has been quashed." Acts 1879, p. 143.

The averments of the information do not, as we think, bring the case within the statute. There was an apparent attempt made, by the averments, to bring the case within both of the above specifications, but they fail to bring it within either of them.

The language of the second clause of the statute, above quoted, "When an indictment has been found by the grand jury," evidently means, when an indictment has been found by the grand jury, for the felony, on a charge of which the accused is in custody. See *Davis v. The State*, 69 Ind. 130.

The information alleges "that an indictment was found by the grand jury, and quashed." But for what the indictment was found, and against whom, does not appear. It may.

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perhaps, be conjectured, that the indictment was found for the offence charged in the information. But, in criminal pleading, it will not do to rest on conjecture. In order that the allegation in respect to the finding and quashing of the indictment should have any force, it should have appeared that the indictment was for the offence charged in the information. *Davis v. The State, supra*. The case, therefore, is not shown to come within the second clause of the statute quoted.

It remains to inquire whether the averments bring the case within the first. It sufficiently appears that the appellant was in custody on a charge of the offence stated in the information. But this is not sufficient to authorize a prosecution for a felony by affidavit and information. There must have been, in order to bring the case within the first clause, no grand jury in session, at the time of filing the affidavit and information. It does not appear from the information, as we think, that no grand jury was then in session. The language of the information is, "that an indictment was found by the grand jury, and quashed, and that said grand jury is not now in session." The obvious and unmistakable meaning of this is, that the grand jury who found the indictment was not then in session. When the indictment was found does not appear; and the allegation can not be held to mean that *no* grand jury was in session at the time of filing the information.

The information does not show such a state of facts as authorizes the prosecution by affidavit and information, and the motion to quash should have been sustained.

The judgment below is reversed, and the cause remanded.

The clerk will give notice for the return of the prisoner from the state-prison.

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No. 7503.

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74	191
126	563
74	191
158	290

WILL.—Widow's Election.—Statute of Descents.—Sections 27 and 41 of the statute of descents, 1 R. S. 1876, p. 408, taken together, mean that when a substantial provision is made for the widow by the will of her late husband, she can not, in the absence of a plainly expressed intention to the contrary, take both under the will and under the statute. In such event, she has the option simply of taking under the one or the other, as she may prefer. *Armstrong v. Berreman*, 13 Ind. 422, distinguished.

SAME.—Relinquishment of Claim.—Real Estate.—A widow's election to take under the will operates as a relinquishment of all other claims to the testator's real estate.

PLEADING.—Written Instrument not Foundation of Action or Defence.—A party is not required to file with his pleadings an instrument in writing which is to be used merely as evidence at the trial and does not constitute the foundation of his action or defence.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellants.

O. J. Glessner and *E. S. Stilwell*, for appellee.

NIBLACK, C. J.—This was an action of partition, in which Mary J. Ragsdale, Charles T. Ragsdale, Armilda J. Harrell and James H. Harrell were plaintiffs, and Edmund K. Parrish was defendant.

The complaint averred that, on the 1st day of November, 1864, William G. Parrish died, being at the time the owner of an eighty-acre tract of land in Shelby county and the east half of lot No. 10, on Hendricks street, in the city of Shelbyville, in the same county, and leaving as his children, by his first marriage, Edmund F. Parrish, Eli K. Parrish, James F. Parrish, William W. Parrish and Armilda J. Parrish, now Armilda J. Harrell, and Narcissus Parrish, his second wife, as his widow, and Mary J. Parrish, now Mary J. Ragsdale, as his only child by his second marriage, all surviving him; that, since the death of the said William G. Parrish, the defendant has purchased and become the owner of the interests of the said Edmund F. Parrish, Eli K. Parrish, William

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W. Parrish and James F. Parrish, respectively, in and to said real estate; that, on the 13th day of January, 1877, the said Narcissus Parrish died, being at the time the owner of the undivided one-third part of the real estate of which her husband died seized, as above set forth, leaving the said Mary J. Ragsdale as her only child and heir at law; that the said Mary J. Ragsdale, Armilda J. Harrell and the defendant were the owners and tenants in common of the real estate described in the complaint; that the said Mary J. Ragsdale was the owner of the undivided four-ninths thereof; that the said Armilda J. Harrell was the owner of one undivided ninth part of the same, and the defendant was the owner of the remaining undivided four-ninths of such real estate; that the said part of lot in the city of Shelbyville was not susceptible of partition without injury to it and damage to its owners. Wherefore the plaintiffs prayed that partition might be made of the eighty-acre tract of land, and that said part of lot in the city of Shelbyville might be sold and the proceeds divided between the parties according to their respective interests therein.

The defendant answered:

1. In general denial.
2. Setting up a claim to four-sixths of the lands described in the complaint.
3. Averring that the said William G. Parrish had died testate, and that the defendant, before her death, had purchased of Narcissus Parrish, the widow, the interest which she took in the eighty-acre tract of land under her husband's will, whereby he, the defendant, had become the owner of five-sixths of that tract of land; also averring facts upon which the defendant set up a claim to four-sixths of the remaining real estate.
4. Alleging that, by purchasing the interests of the widow and certain heirs of William G. Parrish, the defendant had

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become the owner of seven-ninths of the real estate of which partition was demanded.

Demurrers were interposed and overruled to the third and fourth paragraphs of the answer.

After issue joined, the court, at the request of the plaintiffs, made a special finding of the facts, which was substantially as follows: That on the 17th day of October, 1864, William G. Parrish executed and published his last will, the substantive part of which was in these words:

“This is to certify that I, William G. Parrish, do will and bequeath to my wife, Narcissus, the following property, to wit: First, I want Narcissus Parrish, my wife, to have and to hold all the real estate west of the center line of the eighty acres of land, as long as she remains my widow; also, to have two horses, to wit, namely, Polly and the next most suitable one for her use; and to have one set of gears and one breaking plow, one double-shovel, one single-shovel, plow; also, one wagon and ten head of choice sheep, one breeding sow and pigs, if any, and six choice stock hogs, and two choice milk cows, and all the oats, wheat or hay, that may be on hand, and one-third of the corn, and all the salt pork or bacon, and, also, all the poultry, and all the household and kitchen furniture; and, at the death or marriage of the said Narcissus Parrish, this property, with all its interest or gain over, to go to my children, as I have hereunto stated. After this, I want the balance of my personal property sold, and the sum collected, with all my notes and accounts, and, after paying my debts, I want the balance, with the rents of the east half of the place, put out on interest for my heirs, to be delivered to them by the executor, at the ages, of the boys eighteen, and the girls sixteen years old.”

That, on the 10th day of November, 1864, the said William G. Parrish died, being the owner of the lands described in the complaint, and leaving surviving him, as his children

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by a former marriage, Edmund F. Parrish, Eli K. Parrish, William W. Parrish, James F. Parrish and Armilda J. Parrish, now Armilda J. Harrell; also, Narcissus Parrish, his second wife, as his widow; also, Mary J. Parrish, now Mary J. Ragsdale, as his only child by his marriage with the said Narcissus. That, on the 26th day of November, 1864, the said will of the said William G. Parrish was duly admitted to probate, and the said Narcissus, by a proper instrument in writing, set out in the special finding, elected to take under the will and to accept the provisions made for her by it. That the said Narcissus did not again intermarry with any one, but died, on the 13th day of January, 1877, leaving the said Mary J. Ragsdale as her only child and heir at law; and that, since the death of the said William G. Parrish, the defendant has purchased and become the owner of the interests of the said Edmund F. Parrish, Eli K. Parrish, William W. Parrish and James F. Parrish in and to the lands particularly designated in the complaint; also, that said part of lot in the city of Shelbyville could not be divided, without damage to the owners thereof.

Upon the facts thus found the court, amongst other things, came to the following conclusions of law:

1. That the said Narcissus took only a life-estate in the land devised to her by her husband, and that, by reason of her election to take under the will, she took nothing by descent in any of the other real estate of which her husband died seized.

2. That the said Mary J. Ragsdale was the owner of one undivided sixth part of the real estate in controversy.

3. That the said Armilda J. Harrell was also the owner of one undivided sixth part of said real estate.

4. That the defendant was the owner of the remaining four undivided sixth parts of such real estate, and that partition ought to be made of the eighty-acre tract, between

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the said Mary, the said Armilda and the defendant, according to their respective interests therein.

5. That the part of lot in the city of Shelbyville ought to be sold and the proceeds divided amongst its owners, above named, in the ratio of their respective interests.

Partition of the eighty-acre tract was accordingly decreed and made, and the part of lot in the city of Shelbyville was ordered to be sold, so that the proceeds might be divided between the owners as above stated.

The appellants contend that the court erred in overruling their demurrer to the third paragraph of the answer, because no copy of the will referred to in such paragraph was filed with it; but that objection can not be sustained. The will was not the foundation of the defence set up in that paragraph, but only evidence relied upon to sustain that defence. The filing of a copy of the will, under such circumstances, would have made it a mere exhibit in the cause, constituting no part of the paragraph itself. See *Parsons v. Milford*, 67 Ind. 489, and the authorities there cited.

The appellants also contend that the court erred in refusing to sustain their demurrer to the fourth paragraph of the answer, because copies of the conveyances relied upon by the appellee to support his claim of title, set up in that paragraph, were not filed with and made a part of the paragraph. But, for the reasons given as above, the court did right in refusing to sustain the demurrer to this last named paragraph of answer. A party is not required to file with his pleadings an instrument in writing which is to be used merely as evidence at the trial without constituting the foundation of his action or defence.

The appellants still further contend that the court erred in its conclusion of law, that Narcissus Parrish, the widow, took only a life-estate in the real estate of which her husband died seized, for the alleged reason that his will did not purport to dispose, and did not in fact dispose, of all his real

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estate, and that, as to his real estate not disposed of by his will, he must be held to have died intestate; that, consequently, the election of the said Narcissus to take under the will did not operate as a relinquishment of her fee-simple interest in the real estate not disposed of by the will. The case of *Armstrong v. Berreman*, 13 Ind. 422, is cited by the appellants as sustaining the doctrine thus contended for by them. There were, however, some important differences between the facts in that case and in this. In that case the testator left no children, and only a widow, who was entitled to take all his estate, both real and personal, not disposed of by the will, under the statute of descents, and this court held that, under all the circumstances, the widow in that case took the residuary estate under the statute, and not under the will.

Sections 27 and 41 of the statute of descents, 1 R. S. 1876, p. 408, when taken together, must be construed to mean that when a substantial provision is made for the widow by the will of her late husband, she can not, in the absence of a plainly expressed intention to the contrary, take both under the will and under the statute. In such an event, she has the option simply of taking under the one or the other as she may prefer.

This construction of those sections is impliedly sanctioned by the case of *Armstrong v. Berreman*, referred to above, and has a practical application to the case in hearing.

The will before us did make a substantial provision for the widow, and apparently the principal object in its execution was to make such a provision, having reference to the total value of the testator's estate.

There is nothing in the will expressive of the intention that this provision was to be additional to the interest to which she would have become entitled in the testator's estate under the statute. Therefore, her election to take under the

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will operated as a relinquishment of all other claims to the testator's real estate.

We see no error in the conclusion of law complained of by the appellants.

The provisions of the will in this case are clearly distinguishable from those of the wills referred to in the cases of *Lindsay v Lindsay*, 47 Ind. 283; *Dale v. Bartley*, 58 Ind. 101, cited by the appellants. The question in this case is: What estate did the widow take under the will, in the testator's real estate? And not, what is the *status* of some of such real estate not specifically referred to, or disposed of, by the will?

The judgment is affirmed with costs.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

No. 9525.

JOHNSON v. THE STATE.

LIQUOR LAW.—Sale to Minor.—License.—Indictment.—In a prosecution for selling intoxicating liquor to a minor, under section 13 of the act regulating the sale of intoxicating liquor, 1 R. S. 1876. p. 872, it is wholly immaterial whether the defendant had or had not a license at the time of such sale, and therefore not necessary to aver in the indictment whether he had a license to sell or not.

SAME.—As to sufficiency of evidence to warrant conviction, see opinion.

From the Tippecanoe Circuit Court.

J. F. McHugh, for appellant.

D. P. Baldwin, Attorney General, and *G. W. Collins*, Prosecuting Attorney, for the State.

Howk, C. J.—The indictment, in this case, charged, in substance, that the appellant and one Fred. Johnson, on the

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1st day of November, 1880, at the county and State aforesaid, "did then and there unlawfully sell intoxicating liquor, in a less quantity than a quart at a time, to wit, two gills, to one John Wilson, at and for the price of five cents, he, the said John Wilson, being then and there a person under the age of twenty-one years."

A motion to quash the indictment having been overruled, and an exception saved to this ruling, each of the defendants, on arraignments, entered a plea that he was not guilty as charged in the indictment. By agreements of the parties, the cause was tried by the court, and a finding was made that the defendant Fred. Johnson was not guilty, but that the appellant, Sidney Johnson, was guilty as charged in the indictment, and assessing his punishment at a fine in the sum of ten dollars, and the costs of this prosecution. The appellant's motion for a new trial having been overruled, and his exception entered to this decision, the court rendered judgment against him on its finding.

Errors have been assigned by the appellant, in this court, which call in question the decisions of the circuit court in overruling his motion to quash the indictment, his motion for a new trial, and his motion in arrest of judgment.

The offence intended to be charged in the indictment, the substance of which we have given, is defined and its punishment prescribed in section 13 of "An act to regulate and license the sale of spiritous, vinous and malt and other intoxicating liquors," etc., approved March 17th, 1875. This section 13 reads as follows:

"If any person shall sell, barter or give away, directly or indirectly, any spiritous, vinous or malt liquors, to any person under the age of twenty-one years, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than ten nor more than fifty dollars." 1 R. S. 1876, p. 872.

It is insisted by the appellant's counsel, that the indict-

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ment in this case was bad, and ought to have been quashed, for the reason that it did not charge that the appellant either had or had not, at the time of the alleged illegal sale, a license under the statute to sell intoxicating liquors. It seems to us, however, that, under said section 13 above quoted, it was wholly immaterial whether the appellant had or had not such license, at the time of such sale. The offence consisted in the sale of intoxicating liquor to a person under the age of twenty-one years, and, in making such sale, the appellant violated the provisions of the statute, whether he had or had not a license to sell intoxicating liquors. The fact, if it were the fact, that the appellant had such a license at the time of the alleged sale, would not aggravate or palliate the offence charged; nor would the alternative fact, if such were the fact, that he had no such license, add to or diminish either the qualities of the offence or the extent of the penalty prescribed therefor. Whether, therefore, the appellant was licensed or not licensed, at the time of the alleged sale, he was liable to prosecution, under the section quoted, for an unlawful sale of intoxicating liquor to a person under the age of twenty-one years; and the indictment having charged such a sale by retail, in a quantity less than a quart, it must be held, we think, on a motion to quash, to be *prima facie* sufficient. *Crone v. The State*, 49 Ind. 538; *Payne v. The State*, *post*, p. 203.

In our opinion, the court committed no error in overruling the appellant's motion to quash the indictment. *Meyer v. The State*, 50 Ind. 18.

The only causes for a new trial assigned by the appellant in his motion therefor were, that the finding of the court was not sustained by the evidence, and was contrary to law. The evidence consisted chiefly of the testimony of the youth named in the indictment. He testified, that the appellant and his brother kept a saloon and grocery store, in Tippecanoe county; that he did not know either of them person-

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ally ; that he was nineteen years of age ; that, at their place of business, he drank one glass of beer and paid five cents for it ; that he thought he got the beer of the appellant ; and he pointed out the appellant as the one who, he thought, sold him the beer, but could not say positively ; and that the beer was intoxicating and less than a quart. This evidence was sufficient to satisfy the learned judge who tried the case, of the guilt of the appellant as charged, and he had facilities for determining the sufficiency of the evidence and its probable truth, which we are not possessed of. We can not disturb the finding on the evidence.

The judgment is affirmed, at the appellant's costs.

No. 8285.

McCLINTOCK ET AL. v. THEISS.

PRACTICE.—*Appeal.*—*Supreme Court.*—Under the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, amending section 561 of the practice act, an appeal to the Supreme Court must be taken within one year from the time judgment is rendered.

SAME.—*Venire de Novo.*—A motion for a *venire de novo* is proper only when there is some defect in the verdict of the jury or the finding of the court, and must be made before judgment.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

FRANKLIN, C.—On the 25th day of September, 1876, appellee sued appellants in the Elkhart Circuit Court, alleging that he and one McClintock had been partners in the butcher business ; that said firm was indebted to him in the sum of \$350 ; that said McClintock owed said firm \$1,052 ; that McClintock had wrongfully disposed of \$1,431.25 of the part-

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nership assets, and had fraudulently sold a part thereof to said appellant Waisner; that there was only \$320 of the partnership assets left, and that appellants were threatening to dispose of that. He prayed for a restraining order and an injunction against both of appellants, and a judgment against McClintock for his claim. McClintock answered by a general denial and a special paragraph, closing by asking for the appointment of a receiver. A restraining order was granted until the application for an injunction could be heard. Appellee replied by a general denial. On the 30th of September, 1876, a hearing was had upon the injunction proceeding, and the court found that the allegations in the complaint were true, and ordered the restraining order to be continued in force as an injunction, against both of said appellants.

At the May term, 1877, a trial was had before the court, as to the accounts between the partners, and the court found for appellee against appellant McClintock, in the sum of \$303.40, and rendered judgment therefor.

At the September term, 1877, the receiver filed his report, he having been appointed by the agreement of the parties.

At the May term, 1878, the receiver filed his second report, and on the 16th day of September, 1878, appellants filed exceptions to said report. Exceptions overruled, and excepted to. On the 16th day of November, 1878, said appellants filed a motion for a *venire de novo*, which was overruled, and excepted to. On the 16th day of October, 1879, the receiver filed his final report, to which no exceptions were filed. The report was approved, and the receiver discharged.

The record in this cause was filed in this court November 10th, 1879. This record was made up under the 347th section of the code, and the 348th section provides that "The party excepting may take the reserved question to the Supreme Court by appeal, at any time within one year after final judgment in the cause, and not afterwards."

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The errors assigned are :

“1st. The complaint does not state facts sufficient to constitute a cause of action against either appellant.

“2d. The court erred in overruling the motion for a *venire facias de novo*.

“3d. The court erred in overruling the appellants’ objection to the report of the receiver.

“4th. The court erred in taxing all the costs to the appellant McClintock.” This error is assigned by said McClintock separately.

“5th. The court erred in ordering the receiver to pay the balance in his hands, of \$172.02, to the appellee, Theiss.

“6th. The court erred in confirming so much of said report as showed the sum of \$606.22 paid to appellee, Theiss.

“7th. The court erred in refusing to hear evidence and determine to whom said moneys should be paid.”

The act passed March 14th, 1877, which went into force July 2d, 1877, amended section 561, and provided that “Appeals in all cases hereafter tried must be taken within one year from the time the judgment is rendered ; in all cases, heretofore tried, must be taken within one year from the time this act takes effect.”

Under these statutory provisions, there is but a small portion of this record properly before this court. There had been a final judgment given against both of appellants in regard to the charges of fraud, as contained in the complaint, on the 30th day of September, 1876, in the injunction proceeding, and against appellant McClintock, on appellee’s claim, at the May term, 1877. And, as to the exceptions to the report of the receiver, they were overruled and excepted to, on the 16th day of September, 1878. All of which are to be excluded from having any effect in this appeal, none of them having occurred within one year prior to the appeal being taken.

The final report of the receiver, its approval, and his dis-

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charge occurred within the year. But no objections were made, or exceptions taken, to either of these; and they present no question for decision.

The only question in the record as to what occurred within a year prior to the appeal is the overruling of the motion for a *venire de novo*. And as to what appellants, counsel expected that to apply, it is difficult to determine. This motion can only be made in relation to defects in the verdict of a jury or a finding of the court, and must be made before judgment. At the time it was made, there was no verdict of a jury or finding of the court pending, upon which a judgment was afterward rendered. The motion presented no question to the court, and no error was committed in overruling it. *Shaw v. The Merchants Nat'l Bank*, 60 Ind. 83.

We find no error in the record.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at appellants' costs.

No. 9077.

PAYNE v. THE STATE.

LIQUOR LAW.—Sale to Minor.—Quantity Sold.—Statute Construed.—When Sale not Violation of Law.—Section 13 of the liquor law of 1875, 1 R. S. 1876, p. 869, prohibits the sale of intoxicating liquor, in any quantity, to a minor, to be drank as a beverage, either on or off the premises of the seller, whether he be licensed to sell or not; but such section, construed with other provisions of the act, does not prohibit sales to minors for sacramental, medicinal, mechanical or business purposes.

SAME.—Indictment.—As a general rule, it is sufficient to charge an offence in the language of the statute by which the offence is defined.

SAME.—Defence.—Justification.—Excuses and justifications for selling intoxicating liquor to a minor are matters of defence, and it is not necessary for an indictment to allege that they do not exist.

74	203
125	126

74	203
154	612
154	615

74	203
159	415

74	203
171	8
171	9

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From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

D. P. Baldwin, Attorney General, and *M. S. Mavity*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The indictment upon which the appellant was tried and convicted charges that the appellant “did unlawfully sell to one Lute H. Gaskins, who was then and there a person under twenty-one years of age, one quart of intoxicating liquor, at and for the price of one dollar.”

The contention of appellant’s counsel is that the indictment is bad, because it does not aver that the quantity of liquor sold was less than a quart.

The section of the statute upon which the indictment is founded is as follows: “If any person shall sell, barter or give away, directly or indirectly, any spiritous, vinous or malt liquors, to any person under the age of twenty-one years, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than ten nor more than fifty dollars.”

If this section is to be taken as an independent and distinct enactment, standing apart from the other sections of the statute of which it forms a part, then it must be held to absolutely prohibit all sales of intoxicating liquor to persons under twenty-one years of age. One section of a statute can not, however, be isolated from all others, unless there are express words so requiring, and there are no such words in the statute under consideration. The section quoted must be taken in connection with the other provisions of the statute in which it is written.

Construing, as we must, section 13 in connection with the other provisions of the statute, we are brought to the conclusion that the Legislature did not mean to prohibit all sales to minors. What is meant is, that no person, whether licensed to sell liquor or not, shall sell intoxicating liquor to a minor

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for use as a beverage. The evident intention of the statute is to prevent licensed or unlicensed dealers from supplying persons of non-age with intoxicating liquor for use as a beverage, whether on or off the premises of such dealers. It was not intended to prohibit minors from buying intoxicating liquor for sacramental, medicinal, mechanical or business purposes.

The construction which we have given the statute, and which it is clear is the only one it will bear, does not, however, lead to the conclusion that the indictment is bad. In our opinion the indictment states such facts as show a violation of the statute, for it shows the performance of an act which the statute expressly forbids. The words of the statute are used in charging the offence, and it is a familiar general rule that it is sufficient to charge an offence in the language of the statute by which the offence is defined. That there are some exceptions to this general rule is true, but it is equally true that this case does not fall within any of these exceptions. There is a full and accurate description of the offence in the indictment under examination; time, place, persons and the character of the acts constituting the offence are all fully stated.

The facts stated in the indictment make a case within the statute; and if there are any facts constituting a defence, the accused must show them. The State is not bound to anticipate defences and aver facts rendering them unavailing. Excuses and justifications must come in by way of defence; there is no such a presumption of their existence as requires the State to allege that they do not exist. The rule which we here declare is in harmony with *Ward v. The State*, 48 Ind. 289; *Goetz v. The State*, 41 Ind. 162; *Farbach v. The State*, 24 Ind. 77; *The State v. Kalb*, 14 Ind. 403; *The State v. Hartfiel*, 24 Wis. 60. It was held, in the cases cited, that the want of knowledge that the purchaser was a minor was a matter of defence; and, upon the reasoning

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which sustains that conclusion, it must be held that other matters of excuse or justification are also matters of defence.

In holding, as we do, that such sales of intoxicating liquor to a minor, as that described in the indictment under mention, are *prima facie* violations of the law, we do not mean to hold that proper matter of justification or excuse may not be shown in defence. Upon the contrary, we decide, as already indicated, that a sale to a minor for a lawful business purpose, or for sacramental, medicinal, or mechanical purposes, would not be a violation of the law. The cases of *Arbintrode v. The State*, 67 Ind. 267, and *Grupe v. The State*, 67 Ind. 327, do sustain appellant's contention upon this precise point, but to this extent these cases are built entirely upon *The State v. Zeidler*, 63 Ind. 441. The latter case is overruled by *The State v. Corll*, 73 Ind. 535. The fall of *The State v. Zeidler* carries down so much of the cases referred to as rests upon it. We have approved the cases mentioned in very recent decisions, upon several points, and we are not to be understood as disapproving them except in so far as they may directly conflict with the decision here made.

The quantity of liquor sold is not the controlling element of the offence, as it is where the charge is for retailing liquor without a license. In the former case the controlling element is the purpose for which the purchase was made. It is certainly quite as injurious to the morals and welfare of a child to sell it a quart of whisky as it is to sell it a gill, and no more. The object of the statute obviously is to keep from persons of non-age all intoxicating liquors, and not to permit such persons to buy them for use as a beverage, in any quantity great or small.

Judgment affirmed, at costs of appellant.

Petition for a rehearing overruled.

 Martin, Sr., v. Martin et ux.

No. 7887.

MARTIN, SR., v. MARTIN ET UX.

PLEADING. — Foreclosure of Mortgage. — Cross Complaint. — Demurrer. —

In an action to foreclose a mortgage, a demurrer to a cross complaint, on the ground that it "does not state facts sufficient to prevent said plaintiff from foreclosing said mortgage for the full amount of the debt due therein," contains no cause for demurrer known to the statute, or that should be recognized in practice, and the exception to the overruling thereof presents no question.

PRACTICE. — Agreed Facts. — New Trial. — Where a finding is rendered upon "agreed facts," no reason for a new trial exists.

SAME. — Bill of Exceptions. — A bill of exceptions is necessary to bring to the Supreme Court the evidence adduced at a trial, whether oral testimony, writings, documents, agreed facts, or other form of proof. This rule does not apply to an agreed case under section 386 of the code.

SAME. — The recital in a finding, that the "agreed facts" contain the evidence, is not a substitute for a bill of exceptions.

SAME. — Special Finding. — Request of Parties. — It is only when the special finding was made at the request of one or both of the parties, that exceptions to the conclusions of law stated present any question for the consideration of the Supreme Court.

SAME. — Form of Judgment. — An objection to the form of a judgment will not be considered by the Supreme Court, unless it was brought to the attention of the court below, by appropriate motion, at the time the judgment was entered, or, after its entry, by motion to modify and correct it.

SAME. — Supreme Court. — Issue on Appeal. — Trial by the Record. — Argument of Counsel. — To entitle an appellant to prevail in the Supreme Court, "error in the record" must be made "manifest" by the record, not by argument of counsel.

SAME. — Burden on Appellant. — Silence of Appellee. — While the Supreme Court will not go beyond the brief of the appellant to search the record in quest of errors not pointed out therein, the silence of the appellee on any point is not equal to an agreement to waive the point. The burden is on the appellant to show the error which he has assigned.

From the Posey Circuit Court.

A. P. Hovey and G. V. Menzies, for appellant.

W. P. Edson, for appellees.

WOODS, J. — Suit by appellant against the appellees to foreclose a mortgage executed by them upon the land of the defendant Louis, his wife having no interest therein except as

74	207
130	191

74	207
134	76
135	469

74	207
137	63
137	200
138	599

74	207
140	341

74	207
144	209
147	227
147	699

74	207
149	305
150	635
151	41

74	207
156	636

74	207
161	533

74	207
167	287
168	419

74	207
170	238
170	415

74	207
171	48

Martin, Sr., v. Martin *et ux.*

wife. Answer in general denial, and a separate answer, by way of cross complaint, by the defendant Elizabeth. To this the appellant demurred, on the ground that the same "does not state facts sufficient to prevent said plaintiff from foreclosing said mortgage for the full amount of the debt due therein."

No such cause for demurrer is known to the statute, or should be recognized in practice. The exception to the overruling thereof presents no question. Buskirk's Practice, 180. The pleading to which this demurrer was addressed was not used, nor perhaps designed, "to prevent said plaintiff from foreclosing said mortgage for the full amount of the debt due therein;" and, as a decree for the full amount was awarded, it is evident the appellant was not harmed by the ruling of the court in that respect.

The case was submitted to the court for trial without a jury. The entry of the finding is, in part, as follows: "The court finds the following as the agreed facts in the above entitled cause, and which contain all the evidence in said cause." Here follows a statement of facts and conclusions of law thereon, but the signature of the judge is not appended thereto. Immediately following is a motion for a new trial; but the causes alleged consist of objections to the conclusions of law, and do not come within the statutory causes for which a new trial can be granted. Indeed, there could be no reason for a new trial, as the finding rendered was upon "agreed facts." But, aside from these considerations, the evidence is not brought into the record in the way provided by law, which is by a bill of exceptions. The recital contained in the finding, that the agreed facts contain the evidence, is not a substitute. There is no exception to the rule that a bill of exceptions is necessary in order to bring to this court the evidence which was adduced at a trial, whether it consists of oral testimony, writings, documents, agreed facts, or whatever form of proof. This, of course,

Martin, Sr., v. Martin *et ux.*

does not apply to an agreed case under section 386 of the code. No exceptions were taken to the conclusions of law stated by the court. Indeed, the court was not requested by either party to make a special finding and state its conclusions. It is only when the special finding was made at the request of one of the parties or both, that exceptions to the conclusions of law stated present any question for the consideration of this court. *Conwell v. Clifford*, 45 Ind. 392; *Smith v. Davidson*, 45 Ind. 396; *Weston v. Johnson*, 48 Ind. 1; *The Grover, etc., Co. v. Barnes*, 49 Ind. 136; *Smith v. Johnson*, 69 Ind. 55.

It is equally well settled that an objection to the form of the judgment can not be considered by this court, unless the objection was made at the time the judgment was entered, and a motion was made, or other appropriate step taken, to bring the matter to the attention of the court below, so as to enable that court to enter the proper judgment in the first instance, or, after its entry, to modify and correct it. The appellant made no such objection to the original entry of judgment, nor any motion for the modification thereof. There is no error manifest in the record.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

WOODS, J.—Counsel for the appellant complain very earnestly, if not bitterly, that this appeal has been decided on grounds not discussed or even suggested in the briefs. They say: “Without one word of warning, and without the points now ruled by this court having been noticed, referred or alluded to by counsel, either by the assignment of errors or his able and lengthy brief, the court goes into the record and passes upon two or three positions, unknown and unthought of by the judge below, or either of the counsel engaged in

Martin, Sr., v. Martin *et ux.*

this case, and decides the rights of the parties on points never raised nor discussed. This is a practice, we will be pardoned for saying, that has been heretofore entirely unknown to us."

The counsel have greatly mistaken both the practice and the duty of this court. The issue tendered for our decision by the appellant in every case of appeal is, that "there is manifest error in the record," in some specified particular or particulars. The appellee joins issue and says there is no error. The trial is by the record, not by the argument of counsel, and the appellant has no right to prevail, and we should be derelict in duty if we permitted him to prevail, unless the error is made manifest.

No matter what error the court below may have committed, it is not manifest in the record, unless saved in the lower court and presented in this court, in accordance with the rules of practice. These rules of practice are the law of the land, their reasonableness is justified by experience, and, unless ready to abrogate, we have no right to disregard, them. We never go beyond the brief of the appellant to search the record in quest of errors which have not been pointed out in the brief; but the appellee, without filing any brief at all, is entitled to the benefit of everything in the record which may prevent a reversal of the judgment upon the errors assigned; and, because the counsel on both sides may discuss some question with very great learning and ability, as was done in this case, we are not therefore permitted to shut our eyes against the fact, which we can not otherwise help seeing, that the question is not in the record. The silence of the appellee on any point is not equal to an agreement to waive the point; the burden is on the appellant to show the error which he has assigned. *Powell Appel. Proceed.* 125-8.

If there are points in a record which counsel do not suggest, and we do not perceive them, there are numerous decisions that we will not consider such points on a petition

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for a rehearing, but there is no rule which permits us to ignore what we do see. We read the briefs of counsel, but, as the appeal is tried by the record, we examine that too. See *Heizer v. Kelly*, 73 Ind. 582.

Effort is made to question some points of the decision made, but we do not perceive that, if a rehearing were granted, we could reach a different conclusion.

Petition overruled, with costs.

No. 7649.

COREY ET AL. v. SWAGGER ET AL.

DITCHES AND DRAINS.—Act of 1875.—Sufficiency of Description.—The act of March 9th, 1875, 1 R. S. 1876, p. 428, requires a petition to establish a ditch, to give a *general* description of the proposed starting point, route and terminus. The word “about,” where there are other words limiting and restraining its meaning, does not materially impair the certainty of the description.

SAME.—Petition.—Statement of Necessity for Ditch.—Where the petition avers that the construction of the ditch would be “conducive to the public health, convenience and welfare,” and would be “of public benefit and utility,” the necessity may fairly be inferred. As used in this statute, the word “necessity” does not mean that which is *absolutely* requisite, but that which is *essentially* requisite.

SAME.—Practice on Appeal.—Harmless Error.—On appeal to the circuit court from an order of the board of commissioners establishing a ditch, the cause stands for trial *de novo*, and overruling a motion to set aside the report of the reviewers, if erroneous, did appellants no harm.

SAME.—Evidence.—Report of Reviewers.—The report of the reviewers is not competent evidence on the trial in the circuit court.

From the Grant Circuit Court.

J. L. Custer, for appellants.

R. W. Bailey, A. Diltz and G. W. Harvey, for appellees.

74	211
132	597

74	211
137	392

74	211
148	149

74	211
155	655

74	211
1169	104

Corey *et al.* v. Swagger *et al.*

ELLIOTT, J.—The appellees petitioned the board of commissioners of Grant county “to establish a ditch,” the prayer of the petition was granted and the ditch established. Appellants carried the case by appeal to the circuit court, where trial was had, resulting in a verdict and judgment in favor of the appellees.

Motions were made to dismiss appellees’ petition and to set aside the report of the reviewers. These the court overruled.

Appellants urge, in support of their attack upon the petition, that it is insufficient, because it does not properly describe the ditch sought to be established. The description is as follows: “Said ditch is to commence at a point about forty rods west of the east line of section 13, T. 25 N., range 9 E., in said county, and about thirty rods south of the north line of the S. E. quarter of said section running thence west about 120 rods to the middle line of said section running north and south. Thence north on said middle line about twenty rods to the center of said section. Thence due west about sixty rods. Thence northeastwardly about one hundred and sixty (160) rods, crossing the north line of said section at a point about forty (40) rods west of the center of said north line, into section twelve (12), township 25 N., range 9 E., in said county. Thence northeast about one hundred and twenty (120) rods, crossing the north line of the S. E. quarter of section twelve (12) at a point about forty (40) rods east of the west line of said quarter section. Thence northwestwardly about one hundred rods to a point at or near the center of said section twelve (12), and thence north a distance of about eighty (80) rods or more, and terminating on the south bank of Black Creek, being about two miles in length or more.”

The 2d section of the act under which these proceedings were instituted requires a petition setting forth the necessity for the proposed ditch, “with a *general* description of the

Corey et al. v. Swagger et al.

proposed starting point, route and terminus.” 1 R. S. 1876, p. 428. The appellees’ petition does give a “general description” of starting point, route and terminus. The use of the word “about,” taken in connection with the words restraining and limiting its meaning, does not materially impair the certainty of the description. In the cases of *Scraper v. Pipes*, 59 Ind. 158, *DeLong v. Schimmel*, 58 Ind. 64, and *Farmer v. Pauley*, 50 Ind. 583, there were no words restricting the application of the indefinite terms “about” and “near.” Here, these terms are carefully restricted by giving the section, town and range, and by stating with reasonable accuracy the courses and distances. *Spahr v. Schofield*, 66 Ind. 168; *Milligan v. The State, ex rel.*, 60 Ind. 206.

It is contended that the petition is insufficient, because it does not set forth the necessity for the proposed ditch. The statute does in express terms require that a petition shall be filed “setting forth the necessity” of the proposed ditch. The petition does not in terms aver that there is any necessity for the ditch, nor does it attempt to specifically state facts directly showing a necessity for the establishment of the ditch petitioned for. It does, however, aver “that the construction of the proposed ditch will be conducive to the public health, convenience and welfare, and will be of public benefit and utility.” We think a ditch which is “conducive to the public health, convenience and welfare,” and which is also “of public benefit and utility,” may be justly regarded as necessary. It is evident that the Legislature did not use the word “necessity” as meaning that “which is absolutely requisite,” but as meaning that “which is essentially requisite.” Certainly, what will benefit the public and conduce to the general health and welfare, may be regarded as “possessing the quality of being necessary.” The statements of the petition show with reasonable certainty that there was a necessity for the establishment of the ditch.

The overruling of appellants’ motion to set aside the re-

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port of the reviewers, even if erroneous, did them no harm. The cause stood for trial *de novo* in the circuit court, and the report of the reviewers had there no force or effect whatever. Whether it was correct or not, was of no possible importance, for the trial in the circuit court could not be affected by it in the slightest degree. *Turley v. Oldham*, 68 Ind. 114; *Beck v. Pavey*, 69 Ind. 304.

The appellants' assignment of error based upon the ruling denying a new trial must be sustained. The court, over the objection of the appellants, permitted the report of the reviewers to be read in evidence. This was plainly erroneous. *McKinsey v. Bowman*, 58 Ind. 88; *Freck v. Christian*, 55 Ind. 320; *Turley v. Oldham*, *supra*; *Beck v. Pavey*, *supra*; *Coyner v. Boyd*, 55 Ind. 166.

Other questions are discussed, but it is not necessary for us to consider them, as the cause must be again tried, and it is not probable that these questions will again arise; nor is it important to the rights of the parties that we should now pass upon them.

Judgment reversed.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

No. 9507.

McDONALD v. THE STATE.

PRACTICE.—New Trial.—Record.—Matters assigned as causes for a new trial, and set out in the motion therefor, can not be taken as true statements, if they appear nowhere else in the record.

SAME.—Bill of Exceptions.—Special Instructions.—Oral Instructions.—Alleged erroneous action of the trial court in refusing to instruct the jury specially as asked, and in modifying the several instructions asked without putting the modifications in writing, and in instructing the jury orally, must be shown in the record either by a bill of exceptions or in some other manner authorized by law.

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From the Marion Criminal Circuit Court.

W. N. Harding and *A. R. Hovey*, for appellant.

D. P. Baldwin, Attorney General, and *J. B. Elam*, Prosecuting Attorney, for the State.

Howk, C. J.—The indictment in this case charged the appellant, Hugh McDonald, and one George Wallace, with the crime of grand larceny. Upon arraignment, the appellant entered a plea of “not guilty,” as charged in the indictment, and was separately tried by a jury, and a verdict was returned finding him guilty as charged, and assessing his punishment at a fine of one dollar and imprisonment in the State’s prison for the term of two years, and disfranchisement, etc., for the same period. His motion for a new trial having been overruled, and his exception saved to this ruling, the court rendered judgment against him, in accordance with the verdict.

The only error complained of by the appellant, in this court, is the decision of the trial court in overruling his motion for a new trial. In discussing this supposed error, the appellant’s counsel have confined their argument to the alleged erroneous action of the court in refusing to instruct the jury specially as asked, and in modifying the several instructions asked without putting the modifications in writing, and in instructing the jury orally. These matters are all assigned as causes for a new trial, in the appellant’s motion therefor, but they appear nowhere else in the record. The special instructions asked by the appellant appear to have been set out in the motion for a new trial, and it is stated in said motion that the court refused to give these instructions as asked, and did not put in writing either its modifications of those instructions or its own instructions. But these statements in the motion for a new trial can not be taken as true, and their truth was not shown either by a bill of exceptions or in any other manner authorized by law.

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Buskirk's Practice, p. 254, and cases there cited, and *Burnett v. Overton*, 67 Ind. 557. It follows, therefore, that the questions discussed by the appellant's counsel are not presented for our decision by the record of this cause. *Bates v. The State*, 72 Ind. 434.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

Petition for a rehearing overruled.

No. 9123.

ALLEN ET AL. v. THE STATE.

PRACTICE.—New Trial.—Assignment of Error.—Supreme Court.—Where rulings of the trial court constitute proper grounds for a new trial, they can not be assigned on appeal as independent errors. If presented to the trial court by the proper motion they are covered by an assignment on that motion; if not so presented they can not be made available in the Supreme Court in any manner.

CRIMINAL LAW.—Assault and Battery.—Evidence.—Admissions.—Res Gestæ.—Declarations against Interest.—In a prosecution for assault and battery it is competent for the State to prove declarations made by the accused whether made at the time of the commission of the offence, or not, or whether the injured person was or was not present when they were made. Declarations against interest are admissible in evidence although not a part of the *res gestæ*.

From the Parke Circuit Court.

D. A. Roach and *N. P. H. Proctor*, for appellants.

D. P. Baldwin, Attorney General, and *G. W. Collings*, for the State.

ELLIOTT, J.—Appellants were charged with an assault and battery upon one Andrew J. Lykens, were tried by a jury and convicted of the offence charged

It is assigned as error that the circuit court erred in over-

Allen *et al.* v. The State.

ruling the appellants' motion to quash the information. There was no such motion made, and consequently there is no foundation upon which to assign any such error as that under mention.

There are numerous errors assigned, but all except that above noticed are included in the assignment based upon the ruling denying a new trial. Where rulings constitute proper grounds for a new trial they can not be assigned, on appeal, as independent errors. If presented to the trial court by the proper motion, they are covered by an assignment on that motion; if not so presented, they can not be made available in this court in any manner.

It is insisted by the State that we can not consider any question arising upon the ruling denying a new trial, for the reason that there is no proper bill of exceptions in the record. We think that the evidence is properly in the record. The recital is, that "this was all the testimony and evidence given on the trial," and we find nothing in the record, although it is somewhat confused, which contradicts this recital.

It is claimed by appellants that the court erred in permitting the State to prove declarations made by them after the injured party had left the place where the offence was committed. Appellants are in error. These declarations were admissions, and, as such competent, whether made at the time of the altercation or not. It was entirely immaterial whether the injured person was or was not present when the admissions were made. The counsel are altogether mistaken in supposing that declarations against interest are admissible only in cases where they form part of the *res gestæ*. Of course, the accused may not prove his own statements, made after the offence has been committed, but the State may.

Appellants complain of the admission of other testimony, but no objections were stated and no exceptions reserved, and no question is, therefore, presented upon the rulings admitting such testimony.

The Board of Commissioners of Morgan County v. Gregory.

We need only say of the argument of counsel in support of their contention that the verdict is not sustained by the evidence, that the case for the State was, in our opinion, fully made out by the strongest and most convincing evidence.

Judgment affirmed, at costs of appellants.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

No. 9333.

THE BOARD OF COMMISSIONERS OF MORGAN COUNTY v.
GREGORY.

FEES AND SALARIES.—*County Treasurer.*—*Commission for Collecting Delinquent Taxes.*—Under section 5 of the fee and salary act of March 8th, 1873, Acts 1873, p. 124, and section 155 of the assessment act of 1872, 1 R. S. 1876, p. 111, a county treasurer was entitled to charge and receive a commission of five per cent. on all delinquent taxes collected by him during the current year, paid voluntarily and without levy, and without reference to the particular time of the year at which such taxes may have been collected.

From the Morgan Circuit Court.

L. Ferguson, for appellant.

G. A. Adams and *J. S. Newby*, for appellee.

NIBLACK, J.—This was an action by John N. Gregory, late treasurer of Morgan county, against the Board of Commissioners of that county, to recover an additional compensation for the collection of delinquent taxes for the years 1873 and 1874. At the request of the defendant, the court made a special finding of the facts. The facts as found may be stated as follows :

That from the 5th day of August, 1873, until the 21st day of March, 1878, the plaintiff was the duly elected, quali-

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fied and acting treasurer of the said county of Morgan ; that the plaintiff, as such treasurer, collected delinquent taxes from the tax duplicate of the year 1873, and prior to the 1st day of May, 1874, to the amount of \$3,916.88, and reported the amount thus collected to the defendants, in his May settlement of 1874 ; that the plaintiff, as such treasurer, collected delinquent taxes from the tax duplicate of the year 1874, and prior to the 1st day of May, 1875, to the amount of \$5,828.78, and also reported the amount thus collected to the defendants, in his May settlement for the year 1875 ; that all of said delinquent taxes were collected by the plaintiff, as such treasurer, without levy or sale ; that the plaintiff has received for collecting such delinquent taxes one per cent. thereon, and that the defendants have refused to allow him any more or greater compensation for his services in collecting such taxes ; that the additional compensation of four per cent., claimed by the plaintiff, would make the sum of \$389.82 ; that all of said collections were upon the current duplicates as carried forward from the delinquent registers, and not upon the regular delinquent lists.

From these facts the court came to the conclusion, that the plaintiff was allowed to charge a commission of five per cent. for collecting delinquent taxes for the years 1873 and 1874, and that he was consequently entitled to recover the additional four per cent. so claimed by him, that is to say, the said sum of \$389.82.

The defendants excepted to the conclusions of law thus drawn by the court, but the court, notwithstanding, rendered judgment against them for said sum of \$389.82. Error is assigned upon the conclusions of law as above stated.

The principal question involved in this case was settled in favor of the appellee by the case of *Foresman v. Johnson*, 65 Ind. 132. In that case it was held, and we think held correctly, that, under section 155 of the act of December 21st, 1872, for the assessment and collection of taxes, 1 R. S.

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1876, p. 111, a county treasurer has at all times power to levy and collect delinquent, or other than a current year's, taxes, and is required to levy and collect such delinquent taxes, whether charged upon the current year's duplicate, or otherwise, as well before as after his return and settlement for the current year's taxes. It was further held in that case, that, under that section and section 14 of the act of March 12th, 1875, 1 R. S. 1876, p. 471, concerning the fees and salaries of certain officers, a county treasurer is entitled to charge a commission of five per centum upon all delinquent taxes collected during the year, when paid voluntarily, without reference to the period of the year in which such delinquent taxes may have been collected.

Section 5 of the act of March 8th, 1873, regulating the fees and salaries of certain officers, Acts 1873, p. 124, which continued in force until superseded by the act of March 12th, 1875, provided that a county treasurer should receive five per centum on all delinquent taxes collected, when paid voluntarily and without levy.

This latter section, when taken in connection with section 155 of the act of December 21st, 1872, *supra*, must also be construed to have applied to all delinquent taxes collected during the current year, when paid voluntarily and without levy, and without reference to the particular time of the year at which such delinquent taxes may have been collected.

The conclusion is inevitable that the appellee was entitled to charge and to receive a commission of five per centum on all delinquent taxes collected by him from the duplicates of the years 1873 and 1874, and that the judgment below ought to be affirmed.

The judgment is affirmed, with costs.

Doctor et al. v. Hartman et al.

No. 6682.

DOCTOR ET AL. v. HARTMAN ET AL.

COUNTY COMMISSIONERS.—Jurisdiction.—The board of county commissioners is a court of special limited jurisdiction, possessing only such powers as the statute confers. Not only is its jurisdiction restricted, but the mode of exercising its authority is a limited, statutory one.

SAME.—Highway.—Viewers, Report of.—Public Utility.—Unless a highway is of public utility, it can not be opened across the lands of persons objecting thereto, even though the petitioners therefor are willing to open and maintain it at their own expense; and whether a highway is or is not of public utility is a matter of which the commissioners are informed by the report of viewers.

SAME.—Report of Viewers must be Acted on.—Judgment.—The report of viewers appointed by a board of commissioners, upon petition for the location of a highway, whether favorable or unfavorable to the petitioners, must be acted upon by the board, and, if adverse to the petitioners, the board must pronounce some judgment thereon. Such report stands in the same relation to such board as the verdict of a jury to the court, and it is the duty of the board to pronounce judgment upon it, except in cases where the statute provides differently.

SAME.—Power to Set Aside Report of Viewers.—Reviewers.—There are but two cases in which authority is given the board of commissioners to set aside the report of viewers, and appoint reviewers, and these cases are especially provided for by sections 19 and 23 of the act in relation to highways, 1 R. S. 1876, p. 528, and there are no other cases in which such authority can be implied.

SAME.—Approval of Report of Viewers.—Final Judgment, No Power to Set Aside.—Where the report of viewers is adverse to the petitioners for the location of a highway, and judgment has been entered by the board of commissioners approving the report, such board has no right to set aside such judgment and appoint reviewers.

SAME.—Right to Set Aside Final Judgment.—The right to set aside final judgments is not an ordinary incident of the jurisdiction of courts of limited statutory jurisdiction.

JURISDICTION.—Waiver. — Supreme Court.—Where the law denies to a court jurisdiction of the subject-matter of an action, parties can not confer it, even by express consent, and much less waive objection by not questioning its jurisdiction upon their first appearance to the action. Objections to the jurisdiction of the court over the subject-matter of the cause may be made at any time in the progress of a case, or for the first time in the Supreme Court.

PRACTICE.—Bill of Exceptions.—Record.—Where full information and all essential facts are shown in the record, no bill of exceptions is necessary.

74	221
125	259
126	586

74	221
139	634

74	221
141	110

74	221
148	8
148	140

74	221
153	103

74	221
155	504
156	459

74	221
165	24

74	221
169	403

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From the Allen Circuit Court.

A. Zollars and *F. T. Zollars*, for appellants.

W. G. Colerick, *H. Colerick* and *T. W. Colerick*, for appellees.

ELLIOTT, J.—On the fourth day of the March term, 1874, of the board of commissioners of Allen county, the appellees petitioned for the location and opening of a highway. Three viewers were appointed and directed to report at the June term. On the fifth day of the June term, the viewers reported against the opening of the road, and the commissioners entered an order approving the report, and declaring that the proposed highway should not be opened. On the thirteenth day of the same term, the board, upon the motion of the attorneys of the petitioners and without notice to any one, set aside the former order, and appointed different viewers. The former order was set aside, as the record recited, because one of the viewers was a brother-in-law to one of the parties interested. The viewers appointed under the order of the board setting aside the former order were directed to examine and make report, and in compliance with this order they did, on the thirteenth day of the September term of the commissioners' court, report in favor of opening the highway for which appellees had petitioned. The appellants, on the day this report was made, filed a remonstrance, and the board again appointed viewers, and ordered them to report at the December term. On the fourth day of the December session of the board, and prior to any report being filed by the reviewers, the appellants filed a motion to dismiss the petition and proceedings. The reviewers appointed by the order of September 13th made a report on the eleventh day of the December term, and on that day the appellants' motion to dismiss was overruled and an order entered directing the opening of the highway.

From the order of the board of commissioners directing

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the opening of the highway the appellants appealed to the circuit court, where there was a trial by jury, and a verdict and judgment in favor of the appellees.

The motion to dismiss the petition and proceedings made in the commissioners' court was renewed in the circuit court, was again overruled and exception reserved.

Counsel for appellants contend that when the commissioners entered judgment upon the report made by the viewers against the proposed highway, the petition was finally disposed of and the powers of the commissioners exhausted.

The commissioners' court, as is well known, is one of special limited jurisdiction, possessing only such powers as the statute confers. Not only is its jurisdiction restricted, but the mode of exercising the authority conferred is a limited statutory one. It is true, as counsel for appellees assert, that it is a court of record, but it is also true, as said in *The Board, etc., v. Wright*, 22 Ind. 187, that its "organization and duties are purely statutory."

The statute does not, either in express terms or by necessary implication, confer upon the board of commissioners power to appoint viewers, after those appointed have made a report adverse to the petitioners, and judgment has been entered approving the report. Authority is granted to appoint reviewers in two cases, and those cases are especially provided for by sections 19 and 23 of the highway law. In the first of the sections named, provision is made for the appointment of reviewers in cases where the report is favorable to the highway, and any person over whose land the road will pass remonstrates. The second of the sections referred to makes provision for cases where freeholders of the county remonstrate against the opening of the proposed highway. There are, therefore, but two cases in which authority to set aside the report of viewers is conferred, and applying the familiar maxim, "*Expressio unius est exclusio*

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alterius," we must hold that there are no others in which it can be implied.

The statute does not in express words declare what the commissioners shall do, in cases where the report of the viewers is adverse to the petitioners for the opening of the highway, but we think that, taking all the provisions of the statute together, the intention is that in such cases the commissioners shall act upon the report and deny the prayer of the petition. If this is not so, then the report of the reviewers is of effect only in cases where it is favorable to the petitioners. If we adopt this view, then we should be driven to the conclusion that the report of the viewers is nugatory in all cases where they reach a conclusion against the petitioners. This would be an unreasonable construction of the statute, and one which would utterly destroy the whole statutory scheme for proceedings in highway cases. The report of the viewers against the highway must be deemed to be of some effect, or we should have the commissioners put in the situation of deciding against a proposed highway in very many cases, without any information or evidence as to the necessity or utility of the proposed highway. It is settled that, unless a highway is of public utility, it can not be opened across the lands of persons objecting, even though the petitioners are willing to open and maintain it at their own expense, and whether a highway is or is not of public utility, is a matter of which the commissioners are informed by the report of the viewers. *Blackman v. Halves*, 72 Ind. 515. Many considerations combine in requiring us to hold that the report of the viewers is in all cases to be given effect, and that when adverse to the petitioners the commissioners must take some action upon it; some judgment must be pronounced.

If the commissioners had entered final judgment against remonstrants after the report of the reviewers, we suppose that there could be no question as to the effect of such a

judgment. No authority is given to set aside, and the only remedy afforded the aggrieved party is by appeal. It is difficult to perceive why this is not the rule in cases where the judgment is adverse to the petitioners.

The right to set aside final judgments is not an ordinary incident of the jurisdiction of courts of limited statutory jurisdiction. We can not annex the authority to set aside judgments to the powers expressly granted, upon the ground that such a power is necessarily implied in the grant of the principal power. The principal power to adopt or reject the reports of viewers and reviewers may be completely exercised without implying the power to set aside judgments formally entered of record. Nor can we, by implication, subjoin any such power to those expressly granted, for the express grant itself negatives the existence of the implied power to set aside judgments regularly pronounced and recorded. The judicial powers of a justice of the peace are more extensive than those of commissioners, and his court is one of record, yet it is well settled that a justice can not vacate a judgment except in the manner expressly provided by statute. In *Foist v. Coppin*, 35 Ind. 471, it was decided that a justice of the peace has no power to change, vacate or in any manner interfere with a judgment by him rendered, except in the manner provided by statute. In *Smith v. Chandler*, 13 Ind. 513, it was held that a justice of the peace could only set aside a judgment in the manner expressly authorized by statute, and if he assumed to do it in any other, his acts would be absolutely void. It has been several times held in Wisconsin, that a justice of the peace must obey with strictness the requirements of the statute, and that he can only exercise the powers expressly conferred. It was held, applying this general rule, that a justice has no power to postpone the trial of a cause. *Roberts v. Warren*, 3 Wis. 736; *Brown v. Kellogg*, 17 Wis. 475; *Crandall v.*

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Bacon, 20 Wis. 639. There are cases in our own reports illustrating the general rule and applying it to justices' courts, but we do not think it necessary to cite them. It must be conceded that the courts of justices of the peace are endowed with larger judicial powers than the courts of county commissioners; and, as the former do not possess the implied or incidental power to set aside or vacate judgments, it certainly can not be accorded to the latter.

The general doctrine which applies to the proceedings of the board of commissioners is well stated and applied in, *White v. Conover*, 5 Blackf. 462. It was there said: "We conceive the law to be, that when statutory powers are conferred upon a court of inferior jurisdiction, and a mode of executing those powers is prescribed, the course pointed out must be substantially pursued, or the acts and judgments of the court are *coram non judice* and void." This doctrine has been approved over and over again by this court. We cite of the many cases a few only, showing the application of this settled general principle: *Barnard v. Haworth*, 9 Ind. 103; *English v. Smock*, 34 Ind. 115; *Mossman v. Forrest*, 27 Ind. 233; *Collins v. Fraiser*, 27 Ind. 477. In *The Board, etc., v. The State, ex rel.*, 61 Ind. 75, it was held that the board of commissioners had no power to set aside a judgment upon the ground of fraud, the court saying: "The board of commissioners is a court of inferior and limited jurisdiction, and it can exercise such powers, and such only, as are conferred upon it." It is true that in the case cited the application to vacate was made after the close of the term, but this can make no difference; for, if the right to set aside or vacate judgments is possessed by the commissioners' court as an incidental one, then it may as well be exercised after as during term time. In *The City of Peru v. Bearss*, 55 Ind. 576, the same general principle is enforced; for it was there held that the order of the board of commissioners, made upon the petition of an incorporated city pray-

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ing for the annexation of contiguous territory, must embrace all of the lands included in the petition, or it would be void. In *Windman v. The City of Vincennes*, 58 Ind. 480, the same holding is made. In other States there are many cases illustrating the general rule which prevails in ours. Thus, in *The State v. Castle*, 44 Wis. 670, it was held that passing over a petition for the opening of a highway for one session of the board, and adjourning beyond the time limited by law, discontinued the proceedings. In *The Inhabitants of Monticello v. The County Commissioners, etc.*, 59 Me. 391, it was held that passing the petition over to a time different from that prescribed by law ousted the jurisdiction of the board. The case of *The Inhabitants of Braintree v. The County Commissioners, etc.*, 8 Cush. 546, holds that where commissioners, in laying out a highway, include in their order a condition which they have no power to make, they thereby render void the entire order.

It was held in *Shafer v. Bardener*, 19 Ind. 294, that the court had no power to order a highway opened where the verdict found it to be not of public utility; and the same conclusion was reached at this term in the case of *Blackman v. Halves, supra*, but upon different grounds. The report of the viewers must be held to stand in the same relation to the board of commissioners as the verdict of the jury to the court, and it is the duty of the commissioners to pronounce judgment upon it, except in the cases where the statute provides differently. As the board possesses no power to grant new trials or vacate judgments, the commissioners must act upon the report of the viewers by entering judgment. If the case is one where reviewers may be appointed, then the commissioners must adjudge that they be appointed; if the case is one where there is no power to appoint reviewers, then the judgment must be a final one opening, or refusing to open, the highway. The remedy of the aggrieved party

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is not by motion to vacate the judgment, but by appeal as provided in section 26 of the statute.

The conclusion, that the board had no authority to vacate the judgment entered refusing the prayer of the petition, seems to us to be clearly right, both upon principle and authority. In rendering the judgment, it exhausted the power with which the law had invested it, and it had no right to afterwards attempt to resume authority over the proceedings which the judgment had terminated.

The appellees contend that appellants waived objection by not questioning the jurisdiction upon their first appearance. We think otherwise. If the judgment rendered upon the petition terminated the authority and jurisdiction of the court, it was not within the power of the parties to reinvest the court with jurisdiction. Where the law denies to a court jurisdiction of the subject-matter, parties can not confer it even by express consent.

There is another consideration which should not be lost sight of, and that is, the right of resident freeholders of the county to remonstrate and litigate the question of the utility of the proposed highway. Section 23 of the statute concerning highways provides that freeholders of the county living along the line of the highway may remonstrate, and they are, therefore, entitled to litigate the question of the utility of the road, notwithstanding the fact that the proposed highway does not pass over their lands. Those who are aggrieved because their lands are taken can not, by any act they may do, give jurisdiction ; for all others similarly situated, as well as all resident freeholders along the line, have an interest in the subject-matter of the litigation. The policy of the law is to secure notice to all who are interested, and not to leave it in the power of some of the interested parties to confer jurisdiction by either tacit waiver or express consent. When the proceeding is terminated by judgment, the matter can

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only be again brought into court by commencing proceedings anew, or by appeal.

Other questions are discussed, but the conclusion at which we have arrived renders their consideration unnecessary.

Judgment reversed, at costs of appellees.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—In the petition for a rehearing filed by appellees, it is said that we overlooked their proposition that appeals from commissioners are to be tried *de novo*, and that it is, therefore, not material what errors are committed in the course of the proceedings before the commissioners. We did not overlook this proposition, but we did think, and do still think, that it is without force in a case where the record shows, as it does here, that the proceedings had been fully closed by a final judgment, and that there was a subsequent attempt to resume jurisdiction without any right or authority whatever. Appellees illustrate their argument by supposing the case of a trial before a justice of the peace, and the wrongful refusal of a continuance. The supposed case is utterly unlike the real one. If appellees had supposed a case where the justice had rendered final judgment, and ten or twenty days afterward had resumed jurisdiction and proceeded to re-try the case without the slightest authority for so doing, they would have presented a case much more closely resembling the present.

It is also urged that we did not notice the point that no exception was reserved upon the ruling on the motion to dismiss. We did certainly see in appellees' brief, as well as in the record, the statement, "Come the parties and the court now overrules said motion to dismiss said petition and the subsequent proceedings thereon had before the board of commissioners of Allen county, to which ruling the plaintiffs except." This we deemed a sufficient exception, for the motion

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itself was properly in the record certified from the commissioners' court, as well as properly in the record of the circuit court; so, also, were the facts showing that the board had no jurisdiction to render the second judgment, which they did, or to entertain the petition after they had fully adjudicated and closed the case by final judgment. We supposed that, when we had decided that the judgment of the commissioners was shown to be utterly void because of want of jurisdiction, it was not necessary for us to say that it did not require a bill of exceptions to exhibit what was already in the record. We stated that the record affirmatively showed that the board of commissioners had no jurisdiction, and took it for granted that in such a case it would not be supposed that a bill was necessary. If it had been necessary to examine any matters outside of those properly disclosed by the record, then, doubtless, a bill of exceptions would have been necessary, but here the facts were fully and affirmatively shown by the record, and a bill of exceptions could not have supplied any additional material information. Where full information and all essential facts are shown in the record, no bill of exceptions is necessary; or, as was said in *Young v. Martin*, 8 Wal. 354, no bill of exceptions is necessary where the error alleged is apparent upon the face of the record. A question such as appellees' motion presented might have been made at any time, even in the highest appellate court. Indeed, no formal motion was necessary; a suggestion of want of jurisdiction would have been sufficient. Without even a suggestion, *ex mero motu*, a court will set aside a judgment rendered without jurisdiction. *Hervey v. Edmunds*, 68 N. C. 243; *Cannan v. Reynolds*, 5 Ellis & B. 301; *Coleman's Appeal*, 75 Pa. St. 441; *Crane v. Barry*, 47 Ga. 476; *The State, ex rel., v. The Whitewater, etc., Co.*, 8 Ind. 320. No express act of appellants could have estopped them from asserting that the commissioners had no jurisdiction, and, even if there had been no motion to dismiss, there

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would have been no waiver. *Thatcher v. Powell*, 6 Wheat. 119; *Shriver's Lessee v. Lynn*, 2 How. 43; *Folger v. Columbian Ins. Co.*, 99 Mass. 267; *Watson v. Bodell*, 14 M. & W. 57; *In re College Street*, 11 R. I. 472; *Davis v. Davis*, 36 Ind. 160.

Petition overruled.

No. 9434.

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74	231
147	614

DECEDENTS' ESTATES.—*Appeals by Executors and Administrators.*—The provisions of sections 189 and 190 of "An act providing for the settlement of decedents' estates," etc., 2 R. S. 1876, p. 557, have no application to, and do not govern, appeals in suits not prosecuted under that act, and which are expressly authorized by sections 4 and 21 of the code.

From the Montgomery Circuit Court.

T. H. Ristine, B. T. Ristine, P. S. Kennedy and W. T. Brush, for appellant.

A. D. Thomas and H. M. Billings, for appellees.

Howk, C. J.—This was a suit by the appellant, as plaintiff, on a promissory note for \$400, alleged to have been executed by Sanford P. Gray, William Rider and Ben. T. R. Gray, by their partnership name of Gray, Rider & Co., and payable to the appellant's intestate, Elijah Hall, in his lifetime. The appellant recovered a judgment by default, for the balance due on the note, against the said Sanford P. and Ben. T. R. Gray. The appellee William Rider appeared and answered, and, as to him, the issues joined were tried by a jury, and a verdict was returned for him. Upon this verdict the court rendered judgment that the appellant take nothing by his suit, as against the said William Rider, and that he recover of the appellant his costs in this action ex-

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pending, to be levied, etc. ; and from this latter judgment the appellant now prosecutes this appeal.

The appellee has filed in this court a written motion, in substance, as follows :

“The said appellee William Rider moves the said court to dismiss the appeal in said cause, for the reason that said appeal was not taken within thirty days after the decision was made in said cause, as required by sections 189 and 190 of ‘An act providing for the settlement of decedents’ estates,’ etc., approved June 17th, 1852.”

We are of the opinion that this motion ought to be, and must be, overruled, for the reason that sections 189 and 190 of the decedents’ estates act, mentioned in the motion, are not applicable to such cases as the one at bar. Those sections apply, and were intended to be applied, only to such suits or proceedings as were manifestly had and held under and pursuant to the provisions of the act for the settlement of decedents’ estates, and were not authorized by any other statute. Such suits as the one we are now considering are expressly authorized by sections 4 and 21 of the code, and are not prosecuted under or governed by the provisions of the statute for the settlement of decedents’ estates. Appeals in such suits are regulated by and must conform to the provisions of the code on the subject of appeals. This view of the question is strongly supported, as it seems to us, by section 567 of the code, wherein provision is made that “Executors, administrators and guardians may have an appeal and stay of proceedings in the court below, without giving an appeal bond.” 2 R. S. 1876, p. 244.

Final judgment was rendered by the trial court, in this case, in favor of the appellee William Rider, and against the appellant, on the 26th day of May, 1880, and this appeal therefrom was perfected, by the filing of a transcript of the record thereof in the office of the clerk of this court, on the 11th day of May, 1881, within one year from the ren-

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dition of said judgment, in conformity with the provisions of section 561 of the code, as amended by section 2 of the act of March 14th, 1877. Acts 1877, Spec. Sess., p. 59. This was sufficient. This conclusion is not in conflict, but in perfect harmony, with the decisions of this court in *Seward v. Clark*, 67 Ind. 289, and in *Bell v. Mousset*, 71 Ind. 347, for the cases cited were each commenced and prosecuted under, and were each governed by, the provisions of the act in regard to the settlement of decedents' estates.

The motion to dismiss this appeal is, therefore, overruled, at the costs of the appellee William Rider.

No. 7678.

JOHNSON v. WILEY.

SUPREME COURT.—Bill of Exceptions.—Omission of Part of Evidence.—

Where a bill of exceptions affirmatively shows that it does not contain all the evidence, this court will not consider any question which requires for its full understanding and correct decision an examination of the entire evidence given on the trial, even though it contain the statement that "this was all the evidence given upon the trial of the cause."

SAME.—Practice.—It is always necessary for one who complains of the ruling of a trial court, to bring to the appellate court a record fully and clearly showing that there was error in the proceedings or judgment appealed from; but where the questions presented may be determined as well without the entire evidence as with it, this court will consider and decide them, although all the evidence is not in the record.

SAME.—In order to present a question upon the exclusion of testimony, where the evidence is not all contained in the bill of exceptions, it must affirmatively appear that the omitted evidence does not directly bear upon or affect the ruling excluding the testimony.

EVIDENCE.—Cross-Examination.—The cross-examination must be confined to the subject-matter of the original examination.

SAME.—Witness.—Impeachment.—Collateral Matter.—A collateral matter can not be inquired into for the purpose of impeaching a witness.

74	233
135	414
74	233
142	441
74	233
147	301

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SAME.—Motives.—Contradictory Statements Concerning.—It is proper to show the motives or feelings of a witness, and it is competent, for the purpose of impeachment, to prove that he has, at a specified time and place, made statements showing that his impartiality is affected by motives arising from friendship, affection, fear or interest.

From the Ohio Circuit Court.

A. C. Downey and *H. S. Downey*, for appellant.

O. B. Liddell and *J. S. Jelley*, for appellee.

ELLIOTT, J.—The questions discussed in appellant's brief all arise upon the ruling denying his motion for a new trial.

It is strenuously insisted by appellee's counsel that the evidence is not all in the record, and that, therefore, none of the questions discussed are properly presented. The position of appellee, that, where the bill of exceptions affirmatively shows that all of the evidence is not incorporated, this court will not pass upon any question which requires for its full understanding and correct decision an examination of the entire evidence given upon the trial, is undoubtedly correct. This is so although the bill contains the usual statement that "this was all the evidence given upon the trial of the cause." *Powers v. Evans*, 72 Ind. 23; *Morrow v. The State*, 48 Ind. 432; *Miles v. Buchanan*, 36 Ind. 490; *Ward v. Bateman*, 34 Ind. 110; *The State, ex rel., v. Swarts*, 9 Ind. 221. The record sustains the statement of counsel that the bill of exceptions does not contain all the evidence. In this condition of the record, we can not, under the settled rules of practice stated, consider any question which requires an examination of the entire evidence given in the cause.

There are questions arising upon a ruling denying a motion for a new trial which may be as well and fully considered without the entire evidence as with it. In such a case, the questions will receive consideration, although the bill of exceptions neither contains, nor professes to contain, all the evidence adduced upon the trial. The rule upon this subject is this: Where the questions may be determined as well with-

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out the entire evidence as with it, this court will consider and decide them, although all the evidence is not in the record. *The Estate of Wells v. Wells*, 71 Ind. 509. There are, of course, very many cases in which the questions arising upon a ruling denying a new trial can not be either intelligently understood or properly decided without an examination of all the evidence, and in such cases all must be incorporated in the record. It is always necessary for one who complains of the ruling of a trial court to bring to the appellate court such a record as fully and clearly shows that there was an error in the proceedings or judgment appealed from.

It is very clear that, with two exceptions, all the questions discussed by counsel in the present case require for their intelligent understanding and just consideration a full knowledge of all the evidence given in the cause, and this knowledge the record does not supply. To the two questions which can be fairly understood without the entire evidence, we shall confine our discussion. While we are clear that there are not more than two questions properly before us, we are not so clear that the record does present more than one. The first of these questions arises upon the ruling excluding testimony offered by the appellant. The appellee argues that we can not, without all the evidence before us, consider the question whether testimony was or was not erroneously excluded. The broad proposition is made that it is, in all cases, improper to consider the correctness of a ruling excluding evidence, unless the entire body of the evidence is fully and properly in the record. This proposition declares an erroneous doctrine. There are cases where the appellate court may rightfully review a ruling excluding testimony, without having all the evidence before it. That this is so, a few familiar illustrations will fully prove. Take, for illustration, an action upon a promissory note, where the sole defence was payment; would it need all the evidence to properly apprise the appellate court that the trial court erred

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in rejecting evidence of the payment of money to the plaintiff? Or, again, suppose the action to be upon an account for goods sold and delivered, the defence to be a set-off founded upon a promissory note executed by the plaintiff, and the only reply an unverified general denial; would it require all the evidence to make it appear upon appeal that the trial court did wrong in refusing to permit the note to be read in evidence? It is, however, unnecessary to multiply illustrations; it is obvious that there are many cases where it would be wholly useless to set forth the entire evidence; for all that is needed to fully inform the court of the character of the ruling is the record of the issues and the statement of the evidence offered, and a description of the time and manner in which the offer was made. It is not every case in which the appellate court can determine, without the entire evidence being in the record, whether there was or was not error in excluding evidence. Whether such a question can be properly considered and determined, in the absence of any part of the evidence, must be decided upon the record in the particular case. If the record is in such a condition as to fully and fairly show that an error was committed, then that question may be deemed to be properly presented, although some parts of the evidence be omitted from the record, provided it also affirmatively appears that the omitted evidence does not directly bear upon or affect the ruling excluding the proffered evidence.

In the case we are now considering, it does affirmatively appear that the omitted evidence does not at all affect the question whether there was or was not error in excluding the evidence offered by the appellant. The bill, as we have seen, affirmatively recites that it contains all the evidence, but also shows that this recital is not correct. The character of the omitted evidence is very clearly shown, and we can ascertain from a bare inspection of the record that nothing is omitted which in any wise affects the question arising upon

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the ruling excluding the offered evidence. The condition of the record is, in short, such as to fully show that the omitted evidence is not at all essential to a full and intelligent consideration of the question argued.

Appellee had called and examined a witness, and the appellant, upon cross-examination, propounded an interrogatory as to what conversation had occurred at a time and place named in his examination-in-chief, and the court refused to permit the question to be answered. The appellee had not asked the witness any question concerning the conversation called for by appellant's cross-examination, and the witness had not stated it. The appellant had no right, therefore, to elicit that conversation upon cross-examination, for it was not a matter brought out upon the examination-in-chief. It is well settled that a cross-examination must be confined to the subject-matter of the original examination. The question we are now speaking of is presented in two instances by the appellant, but there is no reason for a separate consideration, for the principle governing both is the same. The court refused to permit the appellant to ask questions for the purpose, as was claimed, of laying the foundation for an impeachment. The question which the appellant stated was, "Did not Fletcher Pate say to you that you had better accept the will, and did you not reply that the Wileys had threatened that, if you did not come here and testify, they would bring a suit on the note?" Time, place and person were properly designated in other interrogatories, and from the testimony previously given it very plainly appeared that the note referred to was that of the witness' husband.

The question for our decision is, whether the subject-matter of the interrogatory is collateral to the issues in the case; for if it is, then, under the very old and very familiar rule, that a collateral matter can not be inquired into for the purpose of impeaching a witness, the court did right in refusing

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to allow the interrogatory to be asked. It is well settled that it is proper to propound, upon cross-examination, interrogatories tending to ascertain the motives or influences which operate upon the mind of the witness. It is, indeed, one of the chief offices of a cross-examination to ascertain the bias or prejudice of a witness, whether arising from affection, hatred or self-interest.

In the present case, the credibility of the witness might have been affected by an admission that she was testifying under the influence of fear, produced by threats to involve her husband in litigation. One testifying under the influence of fear, or acting under the influence of a desire to shield a near relative from pecuniary loss, is not so likely to impartially and correctly state facts as the witness who goes upon the stand uninfluenced by any such motives, and whose only desire is to state fully the facts as he knows or believes them to exist. It is not, of course, for the trial court to decide to what extent such motives may influence the witness, nor to what extent, if at all, they may be deemed to affect the witness' credibility; those questions are exclusively for the jury. There is some conflict upon the question whether an impeachment by proof of previous contradictory statements can be founded upon matters relating to the motives or feelings of a witness. The earlier English cases held that such matters were not collateral, and that it was proper to impeach the witness by evidence of previous contradictory statements, but many of the later cases declare a different doctrine. An English author, commenting upon these cases, says: "Such being the conflict of authorities, it is no easy matter to apply the rule with precision to any new combination of facts; but probably a sensible lawyer, who was really anxious to promote the interests of truth and justice, would on most occasions feel inclined to follow the former, rather than the latter, class of cases. Indeed this view of the law is strongly confirmed by a case

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in the Exchequer, where the learned barons intimated a tolerably decisive opinion, that a witness might be asked any *questions* tending to *impeach his impartiality*, and that his answers might be contradicted by other witnesses." Taylor's Evidence, sec. 1298. Our leading American text-writers approve and declare the doctrine sanctioned by the English author quoted. 1 Greenleaf Evidence, sec. 450; Wharton Evidence, secs. 408, 561.

The general principle here involved received the approval of this court in the case of *Scott v. The State*, 64 Ind. 400, in which it was held that where a witness on cross-examination denies having made a statement indicating hostility to the cross-examining party, he may be contradicted. It can make no difference whether the motives arise from hatred, interest or affection, the principle is the same. If it be proper to contradict a witness, by proving that statements have been made indicating hostility and enmity, it surely must be competent to prove statements showing that the impartiality of the witness is affected by motives arising from friendship, affection, fear or interest. The character of the motive can make no difference in the application of the legal principle which permits motives to be made the subject of inquiry. Evidence showing the motives of a witness can not be deemed to be collateral in such a sense as to require a denial of the right to impeach by evidence of previous contradictory statements.

The only other question properly in the record grows out of the refusal of the court to submit to the jury an interrogatory propounded by the appellant; but, as the judgment must be reversed because of the error in excluding evidence, it is unnecessary to consider the questions arising upon this ruling.

Judgment reversed, at costs of appellee.

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No 7293.

ENSLEY v. McCORKLE, SHERIFF, ET AL.

REPLEVIN BAIL.—Entry of.—Affidavit.—Confession of Judgment.—Section 385, 2 R. S. 1876, p. 190, in relation to the confession of judgment, does not require any affidavit in connection with the contract and entry of replevin bail. Such bail undertakes for the payment of the debt of another, which is already in judgment, excluding inquiry concerning its validity or the amount due thereon.

SAME.—Attestation of, by Clerk.—Where the entry of replevin bail on a judgment rendered in the circuit court was not formally approved or attested by the clerk thereof, such entry is not, for that reason, invalid or of less legal effect than if there had been such formal approval.

SAME.—Presumption.—Statute Construed.—Section 421, 2 R. S. 1876, p. 202, does not in terms require an attestation or formal approval by the clerk of the entry of the recognizance of replevin bail; and, in the absence of an unequivocal showing that the entry was made without his knowledge and approval, the existence of the entry upon the judgment docket of the court is sufficient proof of his approval.

SAME.—Foreclosure.—Execution Against Replevin Bail, where there is no Personal Judgment.—Clerk may Issue.—Where a judgment of foreclosure is rendered without any personal judgment, and an entry of replevin bail is written and signed immediately following the decree, the clerk may, after the sale of the mortgaged premises, issue an execution against the property of the replevin bail for any balance remaining unsatisfied of such decree, without any order of the court therefor.

From the Shelby Circuit Court.

A. Blair, E. P. Ferris and W. W. Spencer, for appellant.
B. F. Love and H. C. Morrison, for appellees.

WOODS, J.—Complaint for injunction. Judgment on demurrer to the complaint, for the appellees. The facts on which the injunction was prayed are substantially the following: The appellee Nancy Chandler, on the 14th day of November, 1876, obtained in the court below a decree for the foreclosure of a mortgage on real estate, against Robert and Lydia E. Titus. Robert Titus had purchased subject to the mortgage, but had not assumed the payment of the debt. There was, therefore, no personal judgment rendered in connection with the decree. Upon the order

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book, immediately below the entry of the decree, the appellant had made and signed the following :

“I, William S. Ensley, acknowledge myself replevin bail for the payment of the sum of eight hundred and seventy-eight dollars and twenty-five cents, the amount mentioned in the foregoing decree, together with accruing interest and all costs thereon, on or before the expiration of the time allowed by law for the stay of execution on the same.

“Witness my hand and seal, this 18th of December, 1876. Wm. S. ENSLEY. [L. s.]”

On the 28th day of May, 1877, by order of the plaintiff therein, a duly certified copy of said decree and contract of replevin bail was issued by the clerk to the sheriff, the appellee McCorkle, who, by virtue thereof, made due sale of the mortgaged premises to the appellant for the sum of one hundred dollars, which was applied in payment of the costs and in part payment of the amount due upon the writ. Thereafter, on the 8th day of December, 1877, presumably upon request of the plaintiff in said decree, as there is no averment to the contrary, the clerk issued to said sheriff a second writ, running in the name of the State and addressed to the sheriff of the county, reciting the recovery and entry of said decree and contract of replevin bail, and setting the same out by copy, and reciting the issue of a copy thereof to the sheriff and his return thereon, setting them out by copies also, and concluding as follows, to wit : “And whereas there remains unpaid upon said judgment and order of decree and interest the sum of \$874.68, after the proceeds of said sale of lands were so offered (applied?), all of which is shown by the sheriff’s return now on file in this office, you are therefore commanded to levy upon and sell any property of the said William S. Ensley, the replevin bail, subject to execution, in your county, to satisfy the said unpaid part of said decree above stated, a copy of which decree is herein

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above set forth, and return this writ within 180 days from the date of the same, with your doings thereon. In witness whereof, I, Bellamy S. Sutton, clerk of said court, hereunto affix the seal thereof and subscribe my name, at Shelbyville, this the 8th day of December, A. D. 1877. Bellamy S. Sutton, Clerk." By virtue of this writ, the sheriff had seized, and was about to sell, certain personal property of the appellant, who brought suit to enjoin the sale.

Besides the facts recited, the complaint contains an averment "that no affidavit of any kind was affixed by the plaintiff to said entry" of replevin bail, "and that the same was never approved by the clerk of the Shelby Circuit Court, nor attested by him." No affidavit was necessary. It is true that the code, section 385, provides that "Whenever a confession of judgment is made by power of attorney or otherwise, the party confessing shall at the time he executes such power of attorney, or confesses judgment, make affidavit that the debt is just and owing, and that such confession is not made for the purpose of defrauding his creditors;" and, by section 427, "Every recognizance of bail, taken as above provided, shall have the effect of a judgment confessed, from the date thereof, against the person and property of the bail." We are not, however, of the opinion that any affidavit is required in connection with the contract and entry of replevin bail. The affidavit is required, if at all, of the one confessing the judgment, and is manifestly inappropriate to the case of one who signs as replevin bail. He owes no debt, and undertakes simply for the payment of the debt of another, which is already in judgment, excluding inquiry concerning its validity or the amount due thereon. We do not interpret the complaint as meaning that the clerk did not approve or accept the bail, but simply that the entry thereof was not formally approved or attested by him, and we are not of the opinion that, for this reason, the entry is invalid, or of less legal effect than if there had been such formal ap-

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proval. The question is, in all essential respects, the same as was decided in *Miller v. McAllister*, 59 Ind. 491, wherein, overruling *Houglan v. The State, ex rel.*, 43 Ind. 537, and *Fentriss v. The State, ex rel.*, 44 Ind. 271, it was held that the absence of an attestation by a justice of the peace, from an entry of replevin bail on a judgment rendered by such justice, did not invalidate the entry. The reasoning of that case, based as it was on the language of the law authorizing the taking of replevin bail by justices of the peace, is equally applicable to the law and facts of this case.

The provision of the code on the subject is as follows: "Sec. 421. The bail, for stay of execution, may be taken and approved by the clerk, and the recognizance entered of record, at any time before the term of stay of execution expires. The undertaking in the recognizance shall be for the payment of the judgment, interest, and costs that may accrue at or before the expiration of the term of the stay of execution. The recognizance shall be written immediately following the entry of the judgment, and signed by the bail."

There is, it will be observed, no explicit requirement of an attestation or formal approval by the clerk, and, in the absence of an unequivocal showing that the entry was made without his knowledge and approval, the existence of the entry upon the docket, which is in the exclusive control of the clerk, is sufficient proof of his approval. If it got there surreptitiously and without his consent, he would doubtless have been justified in erasing the entry, or at least in noting his disapproval.

This brings us to the main question in the case, which is stated by counsel for appellant as follows: "A judgment of foreclosure is rendered without a personal judgment; an entry of replevin bail is written and signed, immediately following the order of sale, but not approved or attested by the clerk. The order of sale is issued, and the land is sold, but not for enough to satisfy the decree. Now what are the

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rights and liabilities of the parties?" Stated more succinctly, and at the same time more accurately, the question is whether the last writ issued in this case was a valid execution against the property of the appellant.

It is contended that the clerk had no power to issue an execution against the property of the appellant; that there being no personal judgment on which an execution could issue against either defendant to the decree of foreclosure, there can be no execution against the replevin bail, unless an order of the court be obtained therefor, upon proper application and notice; that the awarding of an execution, in the absence of statutory power, is a judicial act, and not a ministerial one; and that no such power, in cases like this, is given the clerk by law, the statute contemplating only a joint execution against the principal and replevin bail. In support of these propositions, counsel cite: Code, sec. 428; *Skelton v. Ward*, 51 Ind. 46; *Hutchins v. Hanna*, 8 Ind. 533; *The Vincennes National Bank v. Cockrum*, 64 Ind. 229; Freeman Executions, sec. 23; Herman Executions, sec. 221; *Johnson v. Ball*, 1 Yerg. 291; *Daley v. Perry*, 9 Yerg. 442. We have come to a different conclusion, and think the execution as issued was lawful, and constituted sufficient warrant for the seizure and sale of the appellant's goods. The statute authorizes the entry of replevin bail, "when judgment has been rendered against any person for the recovery of money or sale of property." Sec. 420 of the code. The judgment or decree in this case was, that, upon default of payment of a specific sum of money found due the plaintiff, the mortgaged premises be sold for the purpose of effecting such payment. It was clearly such a judgment as admitted of bail for the stay of execution or of an order of sale thereon. By his contract of bail, the appellant became bound "for the payment of the judgment, interest and costs," etc., and by force of section 427 of the code, *supra*, the recognizance of bail so entered and signed

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by the appellant became in effect "a judgment confessed" against him. As to him, it was a personal judgment, specific in amount, and capable of being enforced as ordinary judgments are enforced, excepting only that the decree against the real estate must have been, as it was, exhausted before resort to the liability of the appellant.

Whether, by virtue of the original order of sale and copy of the recognizance, the sheriff, after selling and applying the proceeds of the real estate, might have proceeded directly against the property of the appellant, may be questionable, but we decide nothing on the point. The law concerning executions, their form, contents, issue, etc., is found in article 22 of the code. By section 405, any party, in whose favor a judgment has been rendered, may at any time within ten years after the entry of the judgment proceed to enforce the same. And applications for leave of the court are required only after the lapse of ten years, sec. 406. When a judgment requires the payment of money, or delivery of real or personal property, the same may be enforced in those respects by execution; where it requires the performance of any other act, a certified copy may be served, etc., sec. 407. There may be three kinds of execution, one against the property of the judgment-debtor, etc., sec. 408.

"Sec. 411. The execution must issue in the name of the State, and be directed to the sheriff of the county, sealed with the seal, and attested by the clerk of the court. It must intelligibly refer to the judgment; stating the court where, and the time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially as follows: *First*. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment out of the property of the debtor, subject to execution.

"Sec. 412. The execution shall be returnable within one hundred and eighty days from its date.

"Sec. 428. At the expiration of the stay, it shall be the

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duty of the clerk to issue a joint execution against the property of all the judgment debtors and replevin bail; but the sheriff shall first levy upon the property of the judgment defendants, if sufficient can be found; if not, he shall then, without delay, levy the execution upon the property of the bail. But no property of the bail shall be sold while property of the original judgment debtor, subject to the execution, can be found in the county."

The provision of the last section, which requires that the property of the principal debtor be exhausted before resorting to that of the bail, was complied with, in the sale of the mortgaged property. Strictly speaking, there was no principal judgment debtor in the case, there being no personal judgment against either of the defendants in the suit; and the defendant, by becoming replevin bail, became the sole judgment debtor against whom an execution could issue. The provisions of this section therefore applied to the case only so far as to require the sale of the mortgaged property before taking execution against the property of the appellant. The execution, as issued, conformed substantially to all the statutory requirements. It ran in the name of the State, was directed to the sheriff of the county, under a whereas, reciting each, it referred to and gave copies respectively, of the original decree, the entry of replevin bail, the original order of sale issued to the sheriff, and his return thereon; it stated the amount actually due, made the proper requirement of the sheriff, was made returnable within one hundred and eighty days from issue, and was sealed with the seal and attested by the clerk of the court.

We find no good reason, either in the authorities cited or in the letter and spirit of the statute, for holding that in such a case execution can be had only upon an order of the court; and we hold that the writ may be lawfully issued by the clerk, as was done in this case.

The judgment of the circuit court is therefore affirmed, with costs.

Applegate *et al.* v. Koons.

No. 8050.

APPLEGATE ET AL. v. KOONS.

PAYMENTS.—*Appropriation of, by Creditor.*—A creditor can not, at his discretion, appropriate payments made by his debtor, after a controversy has arisen concerning them.

SAME.—*Appropriation of, by Court.*—Payments thus made will be applied by the court according to the recognized rules of law governing the application of unappropriated payments.

From the Clark Circuit Court.

J. H. Stotsenburg, for appellants.

NIBLACK, J.—The leading facts of this case may be stated as follows: David S. Koons became treasurer of Clark county on the 5th day of September, 1871, and continued in office for two terms, his second term ending on the 5th day of September, 1875. On the 22d day of March, 1872, he appointed Aaron Applegate his deputy for Jeffersonville township, and took from the said Applegate a bond in the penal sum of five thousand dollars, conditioned for the faithful discharge of his duties as such deputy and the prompt payment over of all moneys collected by him by virtue of his appointment. This bond was also signed by Davis F. Applegate, as surety for the said Aaron, and for his accommodation only. Aaron Applegate continued to act as deputy treasurer, under such appointment, during Koons' first term, collecting and paying over divers sums of money from time to time. He was also continued in the position of deputy treasurer by Koons, during his second term, until December, 1874, but under precisely what circumstances is not shown. During the year 1875, Koons, claiming that the said Aaron Applegate had not paid over all the money collected by him, as deputy treasurer, during his, the said Koons', first term, commenced this action against him and the said Davis F. Applegate, on the bond given by them as above stated. The court which tried the cause, without a jury, found for the

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plaintiff, assessing his damages at \$4,121.92, and, over a motion for a new trial, gave judgment against the defendants for that sum.

It is urged here that the verdict was not sustained by sufficient evidence, and that the damages were excessive. We have no brief from the appellee, and hence no argument in support of the proceedings below. From what we have before us, there seems not to have been very much disagreement as to the various sums of money charged to have been collected, or claimed to have been paid over, by Aaron Applegate. The principal contest appears to have been as to the proper appropriation of certain payments made by Applegate after the commencement of this suit. The appellants maintain that a creditor can not, at his discretion, appropriate payments made by his debtor, after a controversy has arisen concerning such payments, and we think that doctrine is sustained by the authorities. *The United States v. Kirkpatrick*, 9 Wheat. 720; *Robinson v. Doolittle*, 12 Vt. 246; *Milliken v. Tufts*, 31 Me. 497; *Marryatts v. White*, 2 Stark. 91; *Fairchild v. Holly*, 10 Conn. 175.

Payments thus made will be applied by the court according to the recognized rules of law governing the application of unappropriated payments. 2 Greenleaf Evidence, sec. 529, *et seq.*; 7 Wait's Actions and Defences, p. 418.

An examination of the evidence leads us to the conclusion that the court at the trial recognized the right of the appellee to make application of the payments made as above, after this action was commenced, and that, as a result from the recognition of that right, the damages assessed were excessive.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Howk, J., having been of counsel, was absent.

Jones v. The State.

No. 9537.

JONES v. THE STATE.

CRIMINAL LAW.—Affidavit and Information.—Constitutional Law.—Case Overruled.—The act of March 29th, 1879, Acts 1879, p. 143, in relation to the prosecution of felonies by affidavit and information, is constitutional and valid, and whatever is in conflict with this conclusion in *Reed v. The State*, 12 Ind. 641, is overruled.

SAME.—Jurisdictional Facts put in issue by Plea of Not Guilty.—Evidence.—The jurisdictional facts necessary to give the court authority to try felonies by affidavit and information, under said act of March 29th, are put in issue by a plea of not guilty, and such facts must be established by competent and sufficient evidence.

SAME.—Evidence of Jurisdiction.—As to the sufficiency of the evidence of jurisdictional facts to sustain the verdict in such prosecution, see opinion.

From the Knox Circuit Court.

J. B. Brown, for appellant.

D. P. Baldwin, Attorney General, and *J. S. Long*, Prosecuting Attorney, for the State.

Howk, C. J.—This was a prosecution, by affidavit and information, against the appellant, John Jones, and one Young, whose Christian name was alleged to be unknown, for the crime of grand larceny. On arraignment, the appellant and said Young pleaded to said affidavit and information, that they were not guilty as therein charged. The trial of the cause by a jury resulted in a verdict finding the appellant and said Young guilty, as charged in the information, and affixing the punishment of each of them at imprisonment in the state-prison for the period of three years, and a fine of twenty-five dollars each, and disfranchisement and incapacity for holding any office of trust or profit for the term of three years. The appellant's motion for a new trial having been overruled, and his exception saved to this ruling, the court rendered judgment against him, in accordance with the verdict. In this court, errors have been assigned by the appellant, as follows:

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1. The affidavit and information filed in said cause, upon which said action is based, do not, with sufficient certainty, state facts sufficient to confer jurisdiction upon the Knox Circuit Court to try said cause ;

2. Error committed by the Knox Circuit Court, in overruling appellant's motion for a new trial ;

3. The court below had no jurisdiction to try appellant upon the felony charged against him, except upon presentment by indictment, duly returned against him by the grand jury of the court below ;

4. The act of March 29th, 1879, Acts of 1879, p. 143, upon which the court below took jurisdiction of this case, is unconstitutional, illegal and void ; and,

5. The facts stated in the affidavit and information herein do not constitute a public offence.

The first question presented and discussed by the appellant's counsel, in his able and exhaustive brief of this cause, is the alleged unconstitutionality of the act of March 29th, 1879, 'in relation to prosecutions of felonies by affidavit and information, in certain cases.' This question has already been carefully considered by this court, and a conclusion has been reached that the act in question is not in conflict with any of the provisions of the constitution of this State, and must therefore be regarded as constitutional and valid law. *Heanley v. The State, ante*, p. 99 ; *Sturm v. The State, post*, p. 278. We are content with this conclusion, and the question may be regarded as settled, by this court, in favor of the constitutionality and validity of the act under consideration. Whatever may have been said in *Reed v. The State*, 12 Ind. 641, in conflict with this conclusion, is expressly overruled.

The affidavit and information against the appellant and his co-defendant, Young, charged the jurisdictional facts, in this case, as follows : "That the said John Jones and the said Young, whose christian name is unknown, are now in

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custody in the county jail of said county, on the charge of said felony as aforesaid, and that there is no grand jury now in session, in said Knox county.” It is very clear, we think, that the jurisdictional facts thus charged were put in issue by the appellant’s plea of not guilty, and that, on the trial, it devolved upon the State to establish these alleged facts by competent and sufficient evidence. Thus, in *Cobb v. The State*, 27 Ind. 133, which was a prosecution by information for larceny, this court said: “If the facts showing jurisdiction must be alleged, they must be proved. The plea of not guilty put in issue every material allegation in the information. It was the plain constitutional right of the accused to have that issue tried by a jury, which is also constituted the judge of the law, as well as of the facts.”

It is very earnestly insisted by the appellant’s counsel, in the case at bar, “that the evidence entirely fails to prove those jurisdictional facts” which were necessary to give the trial court jurisdiction of the case. The evidence adduced for the purpose of establishing the jurisdictional facts charged was, in substance, as follows:

Henry Freund testified: “I am deputy clerk of this court. No grand jury is in session at this time, nor has there been any at the present term, nor since the affidavit, transcript, and other papers in this case were filed in this court.” Thereupon the witness identified the affidavit filed against said defendants, and transcript from the docket of Mayor Searight filed against defendants in this court.

James E. Kackley testified: “I am the sheriff of Knox county. The defendants were in my custody, in the jail of Knox county, on the 8th day of March, 1881. They were placed in my custody, in jail, on a commitment from Mayor Searight.” (Which was thereupon shown him and identified, as the one under which they were committed.) “Jones has not been in jail since the 9th day of March, 1881, at which time he was bailed out.”

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The only other evidence introduced on the trial, which tended to prove that the appellant and his co-defendant, Young, were or had been in custody on a charge of the particular felony mentioned in the affidavit and information, was the affidavit and transcript from the docket of Mayor Searight, identified by the deputy clerk, and the commitment of the defendants, identified by the sheriff. There is much uncertainty and room for doubt, as it seems to us, not only in regard to this evidence, but also in regard to the evidence adduced upon the merits. A very careful examination of the evidence, however, has led us to the conclusion that the case is one in which this court can not, and ought not to, disturb the verdict of the jury, on any of the questions of fact involved therein. The jury had facilities for determining the credibility of witnesses and the truth of evidence, conflicting as it is, which we, as an appellate court, can not possibly have; and their verdict having been sanctioned by the learned judge who presided at the trial and saw and heard the witnesses testify, this court ought not to disturb such verdict merely on the evidence.

We find no error in the record, which would authorize a reversal of the judgment below.

The judgment is affirmed, with costs.

No. 6937.

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74	252
156	284

ALIEN.—Escheat.—Information.—Counter-Claim.—An information by the prosecuting attorney, under section 761, 2 R. S. 1876, p. 301, may be made the subject of an original action or of a counter-claim by the State, and when it is filed as a counter-claim under section 365, 2 R. S. 1876, p. 185, and the original action is dismissed, the defendant shall have the right to proceed to a trial.

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SAME.—*Intestate — Entry without Information Found.*—Where an alien dies intestate, owning real estate, leaving no one in possession and no known heirs, the State has title at once, and may enter and take possession without information found; otherwise she must first establish her title by information.

SAME.—*Taxes after Escheat.*—After the legal title to the land of an alien has become vested in the State by escheat on his death without inheritable blood, any assessment of taxes upon the land, or its sale for delinquent taxes, is void.

SAME.—*Limitation of Action.*—A counter-claim filed by the State within two years after the passage of the act of December 21st, 1872, 1 R. S. 1876, p. 72, is not barred by section 250 thereof.

SAME.—*Evidence.—Estoppel in Pais.*—An *estoppel in pais* against the State from asserting her title to escheated land is not made out by the assessment of taxes thereon, its sale and conveyance for delinquent taxes, and the assessment and collection of taxes from the purchaser at the tax sale.

SAME.—*Estoppel by Deed.*—An auditor's deed made in consummation of a sale for taxes can not bar the assertion by the State of any claim or right to the land sold.

SAME.—*Taxes.—Merger.—Illegal Sale.*—The State's claim for taxes is merged in the ownership in fee acquired by escheat, a sale for such taxes is illegal, and a purchaser is entitled to repayment of his bid and all subsequent taxes paid, and has a remedy for lasting and valuable improvements.

SAME.—*Query.*—Can the State be estopped by the conduct of public ministerial officers?

From the Benton Circuit Court.

R. D. Logan, E. O'Brien, I. Klingensmith and J. S. Reid, for appellants.

D. P. Baldwin, Attorney General, *T. W. Woollen* and *S. P. Thompson*, for appellees.

WOODS, J.—This action was brought in the Newton Circuit Court, at the March term, 1874, under the provisions of the act of March 10th, 1861, 1 R. S. 1876, p. 61, to authorize aliens to hold, sell and convey lands in this State. The original plaintiffs were Rudolph Emisberger and others, heirs at law of Joseph Emisberger, an alien residing in the State of Indiana, who died intestate, on the 10th day of January, 1860. At the time of his death the plaintiffs were aliens residing in the republic of Switzerland. The

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sole defendant at the commencement of the suit was Christian F. Smith. The object of the suit was to recover the possession of certain lands described by the plaintiffs, who claim as alien heirs of their alien ancestor, against the defendant, who claims remotely under a sale for taxes, and whose title will be noticed more particularly in the course of this opinion. During the proceedings, before issue joined, the State of Indiana, on the information of her prosecuting attorney, under section 761 of the code, was admitted a party defendant, and filed a counter-claim, setting up the alienage of Joseph Emisberger, and claiming title to the lands by escheat, making the original plaintiffs, and John S. Reid and Nancy J. Reid, through whom Smith claims the land, parties defendants thereto. At this stage of the proceedings the original plaintiffs dismissed their complaint. The case then stood as the State of Indiana, plaintiff, against the original plaintiffs, and Reid and Reid, defendants. They answered the counter-claim, separately and jointly, by a general denial and several special paragraphs of answer. A change of venue was then granted to the Benton Circuit Court. In the latter court demurrers for the want of facts were sustained to the special paragraphs of answer to the counter-claim; and a motion to dismiss the counter-claim was overruled. Trial by jury; verdict for plaintiff; motion for a new trial overruled; exceptions; appeal.

The following questions are discussed in this court:

1. First, in the order of the proceedings, but not the first discussed in the brief of appellants, is the question of the dismissal of the original complaint, which it is contended carried with it the counter-claim, and that consequently there was no case of record before the court to try. The ground of the argument is, that, even admitting the escheat as claimed, the State could not assert title until after information found under section 761 of the code. This section is as follows:

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“Whenever any property shall escheat, or be forfeited to the State for its use, the legal title shall be deemed to be in the State from the time of the escheat or forfeiture ; and an information may be filed by the prosecuting attorney in the circuit court for the recovery of the property, alleging the ground on which the recovery is claimed ; and like proceedings and judgment shall be had as in a civil action for the recovery of property.”

The appellants, in other words, contend that an information by the prosecuting attorney, under section 761, can not be made the subject of a counter-claim ; but it is clear to us that such information could be made the subject of an original action in favor of the State, and, as the section declares that under such information like proceedings and judgment may be had as in a civil action, it seems to us to follow that such information may be the subject of a counter-claim ; and, if so, the dismissal of the original complaint did not dismiss the counter-claim ; indeed, section 365 expressly declares that the defendant shall have the right of proceeding to the trial of his counter-claim, without notice, although the plaintiff may have dismissed his action, or failed to appear ; and the practice is well settled accordingly. *Egolf v. Bryant*, 63 Ind. 365.

We have thus far viewed this question as if the State had no right to the possession of escheated lands until after information found. We do not admit this to be the law, though we decide nothing upon the question. There seems to be a difference, in this respect, between cases where the alien dies intestate, leaving no one in possession, and where he makes a devise. In the former case, there are no known heirs, and no claimant appearing ; the State, therefore, has title at once, and may enter and take possession. In the latter case, there are known devisees claiming the land ; the State, therefore, must first establish her title to the land by information found before she is entitled to possession. In this case, Joseph Em-

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isberger died intestate, leaving no one in possession of the land. See the following cases: *Eldon v. Doe*, 6 Blackf. 341; *Doe v. Lazenby*, 1 Ind. 234; *Murray v. Kelly*, 27 Ind. 42; *Fuhrer v. The State*, 55 Ind. 150; *Halstead v. The Board, etc.*, 56 Ind. 363; *Dale v. Frisbie*, 59 Ind. 530; *The State, ex rel., v. Meyer*, 63 Ind. 33; *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; *Wilbur v. Tobey*, 16 Pick. 177; *White v. White*, 2 Met. Ky. 185; *O'Hanlin v. Den*, Spencer, 31; *Colgan v. McKeon*, 4 Zab. 566; *Rubeck v. Gardner*, 7 Watts, 455; *Farrar v. Dean*, 24 Mo. 16; *Crane v. Reeder*, 21 Mich. 24.

2. The appellants insist that the court erred in overruling their demurrer to the counter-claim of the State. Neither the demurrer nor any ruling upon it is in the transcript, nor is the sufficiency of the counter-claim put in question by an assignment of error. There is, therefore, nothing upon this point for us to decide.

3. They also insist that the court erred in sustaining the several demurrers of the State to their special paragraphs of answer. There is nothing available in this point. The general denial of all the defendants was in to the counter-claim. The evidence in support of the special paragraphs might have been, and was, given under the general denial. No injury, therefore, could possibly result from sustaining the demurrers to the special paragraphs of answer to the counter-claim.

4. The instructions given by the court to the jury are rather complained of than discussed by the appellants, and the instructions refused by the court are claimed to be right, but are not supported by any argument; they are, indeed, scarcely more than mentioned. We do not, therefore, feel called upon to examine them in detail. If this opinion is right, then the instructions given were right, and the instructions refused, properly refused.

5. The only question fully insisted upon, which arises

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under the motion for a new trial, is the insufficiency of the evidence to support the verdict, or rather, that the verdict is contrary to the evidence, because it shows that the appellants had title in, and the right of possession to, the land. It is not claimed that the heirs of Joseph Emisberger have any title in the land ; indeed, it is practically admitted that they have abandoned their claim ; but it is claimed that the appellants had, and have, a better right to the land than the State. Nor is it disputed that the State proved her claim as against the heirs of Joseph Emisberger, who originally brought the suit. This brings us to the examination of the title alleged to be in the appellants, and the evidence in its support.

It is claimed that the land was sold in February, 1862, to pay the taxes delinquent for the years 1859, 1860 and 1861, to Nathaniel West, and the certificates of purchase duly given to him by the county auditor ; that West, in February, 1864, assigned the certificates of purchase to John S. Reid, who upon the certificates received the auditor's deed of conveyance for the land ; that John S. Reid conveyed the same, in 1869, to Lafayette McCulloch, in trust, for the benefit of Nancy J. Reid ; that John S. and Nancy J. Reid conveyed the same, in 1873, to the appellant Christian F. Smith, who now claims the title against the State. The only evidence to prove this is as follows : The admission of fact that Joseph Emisberger had no personal property in Newton county during the years the taxes were delinquent upon the land ; the conveyances of the land from the auditor to John S. Reid, from him to McCulloch, from McCulloch to Nancy J. Reid, and from Nancy J. and John S. Reid to Smith. There was no evidence that any taxes were ever legally assessed on the land, that any taxes were legally returned delinquent against it, nor that the land was ever sold for taxes to West, at the proper time and place. Such a deed of conveyance of land sold for de-

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linquent taxes can not be upheld. *Ward v. Montgomery*, 57 Ind. 276 ; *McWhinney v. Brinker*, 64 Ind. 360. Besides, the legal title to the lands became vested in the State by escheat, on the 10th day of January, 1860, by the death of the alien Joseph Emisberger, without inheritable blood. Any assessment of taxes upon the land, or its sale for delinquent taxes after that date, would be void as against the State.

6. It is also claimed by the appellants, even though Smith has only a colorable title derived from the tax sale, that, by section 250 of the act of December 21st, 1872, 1 R. S. 1876, p. 127, the action is barred by limitation. This section provides, that "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the date of the sale thereof for taxes as aforesaid." The State filed her counter-claim in this case in March, 1874, within two years after the passage of the act. Although the tax sale in this case occurred nearly ten years before the State filed her counter-claim, yet, as there was no such law in force at the time the sale was made, the action will not be barred until after a reasonable time has elapsed from the taking effect of the act. In the case of *Dale v. Frisbie*, 59 Ind. 530, wherein this question was carefully considered, it was held that two years and two months after the law took effect was not an unreasonable time within which to allow the claimant to bring his action. It must therefore be held that this case is not barred by the statute.

7. Lastly, the appellants ardently insist that the evidence proves a state of facts which shows that the State is estopped *in pais* by her own acts, from claiming the land against the appellees.

It may be conceded that the evidence fairly proves the following facts: That, upon the death of Joseph Emisberger, January 10th, 1860, the land at once escheated to the State; upon that day the right of the State to the land be-

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came complete. The land was sold in February, 1862, to pay the taxes delinquent upon it for the years 1859, 1860 and 1861; that Nathaniel West was the purchaser of the land at the sale for taxes, and received the regular certificates of purchase therefor from the auditor; that he assigned these certificates to John S. Reid, who, in February, 1864, received the auditor's deed for the land; that, in December, 1869, John S. Reid conveyed the land to Lafayette McCulloch, in trust for the benefit of Nancy J. Reid, in pursuance of which McCulloch, in 1872, conveyed the lands to Nancy J. Reid; that, in 1873, John S. and Nancy J. Reid sold and conveyed the land to Christian F. Smith, who has ever since been in possession thereof and claiming title thereto. All of these deeds of conveyances were duly recorded. Lasting and valuable improvements have been made upon the land since its sale for taxes. It may be conceded, too, that these facts show that the State, through her officers, sold the land for delinquent taxes, which partly accrued after she became the owner of the land; that the proper public officer made a deed of conveyance of the land two years after its sale for taxes, at a time when the State owned the land, and that the State made no claim to the land until twelve years after the sale for taxes—and it may be presumed that she collected her taxes from it during all this time—while it was held and claimed adversely, under the sale.

But all these things conceded, it does not follow, in our judgment, that a case of estoppel *in pais* is made out against the State from asserting her title to the land by virtue of the escheat. In the absence of misrepresentation or fraud, of which there is no pretence, it is of the essence of an estoppel *in pais* that the party claiming the benefit of the estoppel shall have acted in ignorance of material and relevant facts within the knowledge of the other party, or which the other party ought, under the circumstances, to have

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known and communicated. No just claim can be made that the purchaser at the tax sale in question, and the successive grantees under the tax deed, were not as well acquainted with the facts, and as able to learn them by inquiry, as the State or her officers who had any part in making the sale and conveyance. To say the least, the parties had equal opportunity to know the facts, and were alike bound to know the law, and if there is any estoppel in the case, it is not *in pais*, but by deed. But it will hardly be contended that an auditor's deed, made in consummation of a sale for taxes, can bar the assertion by the State of any claim or right to the land sold. Neither by express words nor by implication of law does such a deed contain a covenant either of seizin or warranty. It does not purport to convey any right, title or interest of the State in the land other than its lien for the taxes assessed; and none of the parties to the sale in question could have supposed that a transfer of the title held by escheat was intended. The deed must be deemed to have been intended simply for what it was, a tax deed, operative on the title of the parties against whom the taxes were assessed for which the sale was made, and conveying that title to the purchaser, if the proceedings were conducted in all essential respects in strict compliance with the law, but otherwise transferring to the purchaser only the lien which the State had held, or, if the State had no lien, the right to reclaim the amount of his bid. The tax deed is not even the equivalent of an ordinary quitclaim, which conveys all existing right or title of the grantor, while the former, if in all respects regular, conveys only the right which the State has acquired authority to convey under the particular assessments of taxes for which the sale is made. It is not pretended that the sale under consideration was shown to have been in all respects regularly made, so as to be in itself operative as a valid conveyance of the legal fee to the grantee named in the deed. The effort is to help it out on grounds

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of estoppel; but, as already shown, this can not be done. Estoppels are invoked for the purpose of preventing frauds; but to hold that the purchaser at a tax sale, which he and the officers who conduct it suppose to be a tax sale only, may acquire by estoppel a transfer to himself of some other right or title of the State to the property, even though the existence of that right be at the time unknown, but, whether known or unknown, not in contemplation of the parties, would be to promote fraud, and would impart fresh currency to the obsolete expression that estoppels are odious. Such an application of the doctrine would be fraught with danger to the public interest, and would render the enforced collection of taxes on private property, in which the State holds an interest as mortgagee or otherwise, impracticable, without special legislation to meet the case, unless done at the sacrifice of interests or securities, in most cases probably, more valuable than the taxes.

But, returning to the case in hand, if the purchaser at the tax sale knew of the escheat, he knew that the sale was illegal, the claim for the taxes being merged in the ownership in fee. If he did not know of the escheat, then he did not suppose that he was acquiring any right derived therefrom, and bought as a purchaser at an ordinary tax sale. The amount of his bid at the sale, and of all subsequent taxes paid, he is entitled doubtless to have repaid, and if he or his grantees have made lasting and valuable improvements, the statute furnishes them ample means for obtaining their value. In no view of the case can we discover, in law or in fact, any ground on which an estoppel against the State can rest; and whether, under any circumstances, such an estoppel in such a case could be caused by the conduct of public ministerial officers, we do not find it necessary to decide. On this subject the appellants have cited *Dezell v. Odell*, 3 Hill, 215; *Commonwealth v. Heirs of Andre*, 3 Pick. 224; *Bigelow Estoppel*, p. 246; *Nieto v. Carpenter*, 7 Cal. 527.

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While counsel for the appellee have cited *Bigelow Estoppel*, p. 246 ; *Martin v. Zellerbach*, 38 Cal. 300 ; *Farish v. Coon*, 40 Cal. 33 ; *The People v. Brown*, 67 Ill. 435 ; *Commonwealth v. Heirs of Andre*, 3 Pick. 224 ; *Enfield v. Permit*, 5 N. H. 280 ; *Colman v. Anderson*, 10 Mass. 105 ; *Crane v. Reeder*, 25 Mich. 303 ; *Mattox v. Hightshue*, 39 Ind. 95 ; *Pettis v. Johnson*, 56 Ind. 139 ; *Graham v. Graham*, 55 Ind. 23 ; *Behler v. Weyburn*, 59 Ind. 143 ; *Shumaker v. Johnson*, 35 Ind. 33 ; *Fletcher v. Holmes*, 25 Ind. 458 ; *The Junction R. R. Co. v. Harpold*, 19 Ind. 347 ; *Jersey City v. The State*, 30 N. J. 521 ; *Mills v. Graves*, 38 Ill. 455 ; *Hill v. Epley*, 31 Pa. St. 331 ; *Newman v. Edwards*, 34 Pa. St. 32 ; *Lewis v. San Antonio*, 7 Tex. 288 ; *Thomas v. Bowman*, 29 Ill. 426 ; *Buckingham v. Smith*, 10 Ohio, 288.

Upon the general doctrine of estoppels, see the following authorities : *Penrose v. Griffith*, 4 Binn. 231 ; *The Welland Canal Co. v. Hathaway*, 8 Wend. 480 ; *Carver v. Jackson*, 4 Peters, 1 ; *Laney v. Laney*, 4 Ind. 149 ; *Gatling v. Rodman*, 6 Ind. 289 ; *Conklin v. Smith*, 7 Ind. 107 ; *Barnes v. McKay*, 7 Ind. 301 ; *Morris v. Stewart*, 14 Ind. 334 ; *The State, ex rel., v. Stanley*, 14 Ind. 409 ; *The Junction R. R. Co. v. Harpold*, 19 Ind. 347 ; *Burton v. Reeds*, 20 Ind. 87 ; *Berry v. Anderson*, 22 Ind. 36 ; *Fletcher v. Holmes*, 25 Ind. 458 ; *Love v. Wells*, 25 Ind. 503 ; *Joyce v. The First National Bank, etc.*, 62 Ind. 188 ; *Hadley v. The State, ex rel.*, 66 Ind. 271 ; *The Greensburgh, etc., Turnpike Co. v. Sidener*, 40 Ind. 424 ; *McCabe v. Raney*, 32 Ind. 309.

Judgment affirmed, with costs.

The State v. Pease.

No. 9502.

THE STATE v. PEASE.

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CRIMINAL LAW.—Forgery.—Evidence.—Indictment.—Variance. — In a prosecution for the forgery of a national bank note, the copy of the note set out in the indictment contained the name “L. W. Chittenden, Register of the Treasury,” while in the note offered in evidence the name appeared to be “L. E. Chittenden, Register of the Treasury.” *Held*, that such variance was material and fatal and the note inadmissible in evidence.

From the Huntington Circuit Court.

D. P. Baldwin, Attorney General, and *C. W. Watkins*, Prosecuting Attorney, for the State.

Howk, C. J.—The appellee was indicted for forgery, in uttering and publishing as true and genuine, a certain “false forged and counterfeit national bank note, which false, forged and counterfeit national bank note is of the tenor following to wit: On face of same are written and printed.” Then followed, what purported and was intended to be, a copy of the national bank note, so uttered and published as true and genuine. After setting out this copy of the note, the indictment further charged, that the note “has printed words and figures thereon, which by reason of the soiled condition of the note are too illegible to obtain sense therefrom so as to be set out herein.”

On the trial of the cause, the State offered in evidence the alleged counterfeit note, but its admission was objected to by the appellee, on account of a variance between it and the copy of the note, set out in the indictment. The objection was sustained by the court, and the note was excluded from the jury; and to this action of the court the State at the time excepted. Under the instructions of the court, the jury returned a verdict for the appellee, that he was not guilty as charged in the indictment; and judgment was rendered accordingly.

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By the record of this cause and the errors assigned thereon, the only question of law reserved for the decision of this court is this: Was the apparent variance, between the copy of the note set out in the indictment and the note offered in evidence, a material variance which rendered the note so offered incompetent and illegal evidence? The variance consisted in this: In the copy of the note set out in the indictment appeared the name, "L. W. Chittenden, Register of the Treasury;" while in the note offered in evidence the name appeared to be "L. E. Chittenden, Register of the Treasury." Was this variance material? Did the trial court err in excluding the note offered in evidence from the jury, solely on the ground of such variance? We are of the opinion that, under the decisions of this court, it must be held that the variance in question was a material variance, and that, therefore, the circuit court committed no error in excluding from the jury the offered evidence. The name of the register of the treasury is an essential part of a national bank note, just as much so as the denomination of the note; and a variance in such name is just as material and as fatal to the case, as would be a variance in the amount of the note, on which the indictment was predicated. In either case, the variance would be between the description of the note, on which the indictment was founded, and the note offered in evidence, and would be fatal. *Porter v. The State*, 15 Ind. 433, and cases cited; *Sharley v. The State*, 54 Ind. 168.

The appeal, in this case, is not sustained.

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No. 7489.

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74	265
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DECEDENTS' ESTATES.—*Supreme Court.*—*Appeal.*—*Motion to Dismiss.*—

Waiver.—A motion to dismiss an appeal under sections 189 and 190, 2 R. S. 1876, p. 557, because no bond was filed as required, comes too late when made two years after the case had been submitted by agreement, and briefs upon the merits filed by each party, and must be considered as waived.

PRACTICE.—*General Verdict.*—*Answers to Interrogatories.*—A motion for judgment on the facts found, notwithstanding the general verdict, is properly overruled, where the answers are not inconsistent with the general verdict, or where the facts found are immaterial without a further finding, or do not appear in the pleadings.

SAME.—*Venire de Novo.*—A *venire de novo* is not the proper method to raise the question of the sufficiency of an answer to an interrogatory; but the party should object to receiving the verdict until the question has been properly answered, and, if his objection be overruled, should save his exception to that ruling.

EVIDENCE.—*Former Trial.*—In a second action and trial, it is not competent for a witness to testify in a general way on what theory the suit was first prosecuted, and upon what intimations of the court the case was dismissed.

SAME.—*Admissions of Attorney.*—*Query.*—Can an attorney, in the absence of his client, make an admission of fact which would be binding on the client except for the purposes of the pending case?

SAME.—In an action against a decedent's estate, on a note given by the testator in his lifetime, testimony as to the fact and time of his sending a sum of money to the payee is competent and relevant, it being proper to be considered in determining whether the note was given as compensation for services and acts of kindness to the deceased.

PROMISSORY NOTE.—*Consideration.*—*Gifts inter Vivos and Causa Mortis.*—*Testamentary Disposition.*—The desire of a testator to rectify an inequality in the provisions of his will is not a sufficient consideration to support a note given for that purpose only. *Mallett v. Page*, 8 Ind. 364, criticised and explained.

SAME.—*Executed and Executory Contracts.*—While natural love and affection is a good consideration for a deed or any executed contract as between the parties thereto, it is not so for an executory contract.

From the Greene Circuit Court.

W. J. Baker, L. Shaw, E. E. Rose and E. Short, for appellant.

W. M. Franklin, A. G. Cavins and E. H. C. Cavins, for appellee.

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WOODS, J.—The first question to be decided in this case arises upon a motion to dismiss the appeal. The appellant filed a claim against the estate of Edward West, of whose last will the appellee was executor. In *Seward v. Clark*, 67 Ind. 289, overruling *Hamlyn v. Nesbit*, 37 Ind. 284, this court held that the right of appeal from any decision or judgment, upon a matter connected with a decedent's estate, is given and regulated wholly by the provisions of the act concerning the settlement of decedents' estates. Sections 189 and 190 of that act, as they must now be read—see *Seward v. Clark*, *supra*—provide that any person considering himself aggrieved by any decision growing out of a matter connected with a decedent's estate may appeal to the Supreme Court upon filing with the clerk of the court below a bond with penalty in double the sum in controversy, in cases where an amount in money is involved, and in other cases in a reasonable sum to be designated by the clerk, with sufficient surety, payable to the opposite party in such appeal, conditioned for the diligent prosecution of the appeal, and the payment of all costs, if costs be adjudged against the appellant, which bond shall be filed within thirty days after the decision complained of is made, unless for good cause shown this court shall direct the appeal to be granted on filing the bond within one year after the making of the decision. *Bell v. Mousset*, 71 Ind. 347.

The judgment appealed from was rendered April 5th, 1878, and the transcript filed with the clerk of this court November 26th, 1878, but no appeal bond was filed as required, and for this cause we are moved to dismiss the appeal. The appellant claims that the motion came too late, and that the right thereto has been waived. The case on appeal was submitted by agreement on February 5th, 1879, and briefs upon the merits filed by each party. The motion to dismiss was not made or filed until February 7th, 1881.

We think the appeal ought not now to be dismissed. Had

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the motion been made before or at the time of submission, the appellant could have applied to this court for leave to file the bond within a year from the judgment. The bond is required for the benefit of the appellee, must be "payable to the opposite party in such appeal," and we see no reason for holding that the right thereto may not be waived. An agreement to submit made within the year allowed for the appeal and a postponement of the motion to dismiss beyond that time, in good conscience, should be held to constitute such waiver. See *The State v. Walters*, 64 Ind. 226.

This brings us to the merits of the errors assigned, which are that the court erred in overruling the respective motions of the appellant, for a new trial, for a *venire de novo*, and for judgment in her favor upon the special findings of the jury, notwithstanding the general verdict.

Supporting it by the usual affidavit, the plaintiff filed the following note as the basis of her claim: "East Montpelier, Vt., Aug. 24, 1874. For value received I promise to pay Nancy A. West or order the sum of seven thousand dollars (7000) at my decease without interest. Edward West."

The defences filed were, first, no consideration, and, second, that said Edward West wrote his name on a blank piece of paper and delivered it to the plaintiff, who afterwards, without the knowledge or consent of said Edward, wrote the note sued on, over said signature, with the intent to defraud the said Edward, his heirs, legatees and assigns. Reply in general denial.

Upon a second trial the jury returned a general verdict for the defendant and answers to interrogatories as follows:

"1. At the date of the note sued on was the deceased indebted to the plaintiff for anything? If so, for what and how much? Answer. No.

"2. At the date of the note had the plaintiff rendered any service for the deceased for which there was an agreement

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and intention by both parties, that the deceased should pay? If so, what were such services? Answer. Was not.

“3. If the note was given, was it done for the purpose of equalizing Jeremiah’s family under the will with the deceased’s other brothers? Answer. It was.

“4. If the note was given, was it intended as a gift to the plaintiff? Answer. It was.”

There is nothing in these answers necessarily inconsistent with the general verdict. The first and second interrogatories do not in terms relate to the note in any respect except the date, and any indebtedness of the deceased to the plaintiff, if found to have existed, would have been immaterial, in the absence of a further finding that the note was given therefor. The third answer is without significance because it is not found, and does not appear in the pleadings, who Jeremiah was, nor that the plaintiff was connected with his family; and if it were conceded that natural love and affection between those near akin would support a promise, based on no other consideration, the fourth question and answer can not avail the appellant, because it is not found nor admitted that she bore any such relation to the deceased. The motion for judgment for the appellant on the facts found, notwithstanding the general verdict, was therefore properly overruled.

Neither was there any error in overruling the motion for a *venire de novo*. From what has already been said it is evident that if the third answer had been specific and clear, and favorable to the appellant, it could not have affected the validity of the general verdict. The defective answer, therefore, does the appellant no harm. *Campbell v. Frankem*, 65 Ind. 591. But, if the answer could have been material, a motion for a *venire de novo* was not the proper means to raise the question of its sufficiency. The appellant should have objected to the receiving of the verdict until the question had been properly answered, and, if his objection had

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been overruled, should have saved his exception to that ruling. Buskirk's Practice, 219 ; *McElfresh v. Guard*, 32 Ind. 408. The answers to the third and fourth interrogatories do not involve any such inconsistency but that they may stand together. The note may at the same time have been a gift, and given "for the purpose of equalizing Jeremiah's family," etc. If, therefore, inconsistency between answers to interrogatories could be cause for a *venire de novo*, where there is a general verdict covering all the issues, that cause does not exist in this case.

Among the causes assigned for a new trial is error of law in the admission, over objection, of the following testimony : "At the June term, 1877, of this court, there was a trial of an action on this note between the same parties. The case was * * * tried by the plaintiff upon the theory that there was no consideration for the note but the desire of the testator to equalize the family of his brother Jeremiah with his other brothers, in his will. This was claimed by the plaintiff's attorney on the presentation of the case to the court for trial, and stated on the argument to be the consideration. The plaintiff herself was then in Bloomfield, but was not present. After argument on the legal question as to whether that was a sufficient consideration, the court intimated an opinion that it was not, and the suit was then dismissed by the plaintiff before the finding was announced."

Objection to the admission of this testimony was made on the grounds that it was hearsay, not shown to have been authorized by the plaintiff, and not competent, proper or material evidence ; that it was not proper to admit evidence of admissions of facts made by counsel in the absence of the party, nor to prove that a former suit on the same note was dismissed, nor at what stage and under what circumstances it was dismissed.

The evidence in the case tends strongly to show, and perhaps the great preponderance of it, including admissions

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shown by several witnesses to have been made by the plaintiff, does show, that the note was made solely for the purpose of equalizing the family of Jeremiah with the other brothers of the deceased, but there was evidence that, at and before the time the note bears date, the plaintiff had rendered personal services to the deceased during visits of a few days or weeks at her house ; that the note was made during the last of these visits, no one being present or having a knowledge of the transaction except the plaintiff and the deceased. One witness testified that some time in 1874 the deceased told him that he had given the plaintiff a note for \$7,000, due after his death ; that she and her daughter had been good and kind to him, and waited on him when he was sick, and "I understood him to say he gave her the note for it." The testimony of this witness, as well as that of other witnesses tending in the same direction, was in some measure, perhaps strongly, impeached and discredited ; but it became a question for the jury, and by pertinent instructions of the court it was left to the jury, to determine whether the services referred to constituted the consideration of the note or any part thereof. Under the plea of no consideration, proof of any consideration, however small in value, was enough to support the contract ; and the plaintiff, not being herself a competent witness, and being, therefore, unable to explain or deny the admissions claimed to have been made by her, had a right that every circumstance proven in her favor should go to the jury undiminished in force by the admission of any incompetent evidence to the contrary. Had she been a competent witness and voluntarily had permitted the testimony concerning her alleged admissions to go unchallenged and unexplained, we might perhaps say that it was clear that the testimony complained of was of no importance, or too insignificant to have affected the conclusion of the jury. Yet we should greatly hesitate before so deciding. As a general rule, to which there can hardly be an exception, if there is

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such evidence in support of a proposition as to require its submission to the jury at all, and incompetent but pertinent testimony on the subject is admitted, this court can not, upon a consideration of the weight of the evidence pro and con, say that the error was harmless.

That the testimony under consideration was incompetent, but calculated greatly to influence the mind of the jury, we have no doubt. If the plaintiff herself had been a witness, she might doubtless, on cross-examination, have been asked in reference to the theory on which she prosecuted the first action, and what consideration she claimed for the note at that time; but, even if it were permissible to prove admissions made by counsel on such trial, it was not competent for a witness to state in a general way, as was done in this case, on what theory the suit was prosecuted, and upon what intimations of the court the case was dismissed. This is no proof of what the attorney said or admitted. Whether an attorney, in the absence of the client, could make an admission of fact which would be binding on the client, except for the purposes of the pending case, we are not required to decide; but see the following authorities cited by counsel pro and con: 1 Greenleaf Evidence, sec. 186; 1 Phil. Evidence, side p. 524; *Langley v. Earl of Oxford*, 1 M. & W. 508; *Frye v. Gragg*, 35 Me. 29; *Colledge v. Horn*, 3 Bing. 119; *Moffit v. Witherspoon*, 10 Ired. (N. C.) 185; *The Trustees, etc., v. Bledsoe*, 5 Ind. 133; *Wheat v. Ragsdale*, 27 Ind. 191; *Hays v. Hynds*, 28 Ind. 531; *Booher v. Goldsborough*, 44 Ind. 490; *Cook v. Barr*, 44 N. Y. 156; Code, sec. 324; 2 Wait's Law & Prac., p. 374.

There was no error in admitting the testimony of the witness West concerning the fact of sending, and the time when the testator sent, \$100 to the plaintiff. It tended, in some measure, legitimately to discredit the testimony of the witness Patterson concerning his alleged conversation with the testator on the subject of the desire of the testator to

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send that sum to her. It may be, as suggested, that the conversation with Patterson occurred, and had reference to the sending of an equal sum, at a subsequent time, but that was a question for the jury to decide, in the light of all competent evidence. The testimony of West was competent, and relevant not only to the subject and for the purpose indicated, but for another purpose. If the deceased had, in the fall of 1873, as the witness testified, sent to the plaintiff, or to her husband, the sum of one hundred dollars, it was a fact proper to be considered in determining whether the note sued on was given to compensate her for her acts of service and kindness to the deceased. The testimony on this point being largely circumstantial, the sending of this sum of money at that time as a gift was, to say the least, pertinent and of some significance.

The more important question presented for decision is discussed by counsel, in reference to instructions given and refused. An instruction was given, to the effect that the desire of the testator to rectify an inequality in the provisions of his will was not a sufficient consideration to support the note if given for that purpose only; and the court refused to give an instruction requested by the appellant, to the effect that if the note was given to rectify an inequality in a will then existing, and afterward the testator executed another will in which he left a similar discrepancy in the legacies to his brothers, the plaintiff (who was the wife of the brother Jeremiah) still holding the note, the note is a valid note and supported by a sufficient consideration.

The only authority cited in support of the instruction asked, and refused by the court, is the case of *Mallett v. Page*, 8 Ind. 364. In that case, for the purpose of disposing of his property and for no other consideration, a father procured his son to execute to his minor daughter two notes for three thousand dollars, and, to secure the payment of the same, to execute a mortgage on certain land of the father,

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which he proposed or intended thereafter to convey to the son. The notes and mortgage were delivered to the daughter; and, the mortgage having been duly recorded, the father took charge of the papers; but, afterward changing his mind, probably on account of his displeasure at his daughter's marriage, he destroyed the notes and mortgage, and did not convey the land to the son. The action was by the daughter and husband against the father and son. This court held that the father was estopped by the recitals in the mortgage, made as it was by the son under his direction, from contesting the title of the mortgaged premises, that natural love and affection was a good consideration for the notes and mortgage, and that the father could not show any contemporaneous verbal understanding between him and his son inconsistent with the face of the mortgage, *Jacobs v. Finkel*, 7 Blackf. 432, being cited in support of the latter proposition. The case cited supports the general proposition, that a party to a written agreement can not set up against it a contemporaneous verbal understanding of the parties, but, as we conceive, was not in point for the purpose for which it was cited. The father was not a party to the mortgage, and there was therefore no estoppel by deed against him. There was no estoppel *in pais*, because the facts were equally well known to all the parties. If the father had made a binding contract with the son to convey the land, and in consideration of that contract the son had executed the note and mortgage, the transaction would have been entirely valid and binding on all the parties, and the conclusion of the court on the whole case clearly right; but, on the facts as stated in the opinion, there was no consideration to uphold the notes and mortgage against the son who made them, except his father's promise to convey to him the land embraced in the mortgage; but this promise, if the case shows a promise, was in parol only, was not accompanied with a delivery of possession of the land, and by reason of

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the statute of frauds was incapable of being enforced. The mortgage was only an incident of the notes, and constituted no estoppel against the making of proof that the notes were given without consideration, or upon a consideration which had failed; and, once the notes went down for want of consideration, the mortgage should have gone with them. There can be no pretence that the love and affection of the brother for his sister was the consideration on which he made the notes and mortgage; and it must be equally clear that the father's love for the daughter could not serve to bind the son to a promise, which he made on the strength of the father's promise to convey to him a tract of land. We think the entire reasoning of this case was misconceived and erroneous.

While natural love and affection is a good consideration for a deed, or for any executed contract, as between the parties thereto, it is not so for an executory contract; and so where a father gave one of his sons a note for a thousand dollars, remarking that he had met with losses and was not as wealthy as his brother, it was held that an action could not be maintained on the note against his father's executor. *Fink v. Cox*, 18 Johns. 145. It was there said, that, "In such a case, the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus pœnitentiæ*. It was an engagement to give, and not a gift." This doctrine is elementary. Edwards Bills, etc., 324; Chitty Bills, side p. 74-76, and notes; 1 Parsons Notes & Bills, 178-9; Byles Bills, side p. 123; 2 Kent Com. 439; Story Bills of Exchange, 189, sec. 181; *Hamo v. Moore's Adm'rs*, 8 Ohio St. 239; *Starr v. Starr*, 9 Ohio St. 74; *Copp v. Sawyer*, 6 N. H. 386; 1 Daniel Neg. Instru. 24; Bigelow Bills & Notes, 88.

These authorities show that such notes can not be upheld,

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either as gifts *inter vivos* or *causa mortis*, and it need hardly be stated that they can not be valid as testamentary dispositions.

The judgment is reversed, with costs, and cause remanded, with instructions to grant a new trial.

No. 9501.

RICKARD v. THE STATE.

JURY.—Officer in Charge of.—Presence During Deliberation of Jury Vitiates Verdict.—Under the statutes of this State, an officer having a jury in charge, either in a civil or criminal case, has no authority to speak to them, except to ask them if they have agreed upon a verdict, unless by order of the court, and he ought not in either case to be allowed to be present with the jury during their deliberations; his presence, even though he does not speak to the jury, and though it does not appear to have caused any injury, is sufficient to vitiate the verdict returned by the jury.

From the Clinton Circuit Court.

D. A. Woods, J. C. Suit, A. E. Paige and S. O. Bayless, for appellant.

D. P. Baldwin, Attorney General, and *W. R. Moore*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was indicted in the court below for an assault and battery upon, with intent to murder, John Wyant; and upon trial he was convicted of assault and battery with intent to commit voluntary manslaughter, as charged in the indictment, and was sentenced to imprisonment in the state-prison for the term of two years. At the proper time, he made a motion for a new trial, on the ground, among other things, stated in and supported by the

74	275
126	570
74	275
151	676
74	275
163	510

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following affidavit, but the motion was overruled, and exception taken :

“State of Indiana v. William Rickard :

“Comes now William Rickard, and upon his oath, being first duly sworn, says that the jury, after having been instructed by the court, retired to deliberate upon their verdict in the above entitled cause, at about six o'clock P. M. of March 23d, 1881, and returned a verdict of guilty against him at 9 o'clock A. M., March 24th, 1881, having been about fifteen hours deliberating upon their verdict ; that said jury during said time were in charge of George Mitchell, their sworn bailiff, who at all times had access to their room where said jury was deliberating, and who frequently passed in and out thereof ; that said Mitchell remained with said jury a large portion of the time while they were deliberating and considering of their verdict in said cause, as aforesaid, all of which is true, as the affiant is informed and verily believes.

(Signed) WILLIAM RICKARD.

“Subscribed and sworn to before me, this 29th day of March, 1881. ALLEN E. PAIGE, Notary Public.”

The State introduced no evidence contradicting, explaining or qualifying this affidavit ; and we are of opinion that on the facts thus stated a new trial should have been granted.

The precise question here presented recently came before the Supreme Court of Michigan, by whom it was held to be error to permit the officer having charge of a jury to be present during their deliberations, even though he does not speak to them, and it does not appear that any harm resulted therefrom. *The People v. Knapp*, 42 Mich. 267.

The reasons assigned by COOLEY, J., who delivered the opinion in the cause, are cogent, and, to our minds, quite conclusive of the question. We make some extracts from the opinion :

“It is not claimed that the officer can with propriety be allowed to be within hearing when the jury are deliberating.

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Whether he does or does not converse with them, his presence to some extent must operate as a restraint upon their proper freedom of action and expression. When the jury retire from the presence of the court, it is in order that they may have an opportunity for private and confidential discussion, and the necessity for this is assumed in every case, and the jury sent out as of course, where they do not notify the court that it is not needful. The presence of a single other person in the room is an intrusion upon this privacy and confidence, and tends to defeat the purpose for which they are sent out. * * * In their private deliberations the jury are likely to have occasion to comment with freedom upon the conduct and motives of parties and witnesses, and to express views and beliefs that they could not express publicly without making bitter enemies. Now the law provides no process for ascertaining whether the officer is indifferent and without prejudice or favor as between the parties; and as it is admitted he has no business in the room, it may turn out that he goes there because of his bias, and in order that he may report to a friendly party what may have been said to his prejudice, or that he may protect him against unfavorable comment through the unwillingness of jurors to criticise freely the conduct and motives of one person in the presence of another who is his known friend. Or the officer may be present with a similar purpose to protect a witness whose testimony was likely to be criticised and condemned by some of the jurors. * * *

“It was held in *Cole v. Swan*, 4 Greene (Iowa), 32, that officers having a jury in charge while they are deliberating on their verdict should never speak to them except to ask them whether they have agreed, and that, if an officer violated this rule, any verdict afterward rendered, whether the conversation did or did not have any influence in producing the verdict, should be set aside the moment the fact comes to the knowledge of the court. We have said enough already

 Sturm v. The State.

to show that it is not conversation alone that is mischievous ; the mere presence of the officer within the hearing of the jury is often quite as much so. In one case what he would say might influence the verdict ; in another, what his presence might restrain jurors from saying, might accomplish the same result."

An officer having a jury in charge, either in a civil or criminal case, has no authority, under our law, to speak to them, except to ask them if they have agreed upon a verdict, unless by order of the court ; and in neither case is it contemplated that he may be present with them during their deliberations. Code, sec. 329 ; Criminal Code, sec. 114.

The judgment below is reversed, and the cause remanded for a new trial.

The clerk will give the proper notice for the return of the prisoner.

 No. 9410.

STURM v. THE STATE.

CRIMINAL LAW.—Felony.—Practice.—Affidavit and Information.—The act in relation to prosecutions of felonies by affidavit and information in certain cases, approved March 29th, 1879, Acts 1879, p. 143, is constitutional.

SAME.—Sufficiency of Affidavit.—The averment, "and affiant further says that there is no grand jury in session at this term of said Warren Circuit Court, and that the defendant is now in the jail of said county on said charge," is sufficient under the first clause of section 1 of said act.

SAME.—Information.—"Affiant" instead of "Prosecuting Attorney."—*Jurisdiction.*—An objection that the word "affiant" was used, instead of the words "Prosecuting Attorney," in an information, can not be raised for the first time on an assignment of error questioning the jurisdiction of the court.

SAME.—Practice.—New Trial.—In criminal cases, the application for a new trial must be made before judgment.

74	278
139	500

74	278
140	358

74	278
144	19

74	278
165	570
165	571

74	278
171	538

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SAME.—Prayer of Information.—The prayer of an information, “that a warrant be issued for the said defendant in this behalf, that he may answer in the premises,” can not be allowed to control or modify the direct charge or charges contained in the body thereof.

SAME.—Refusal of Continuance.—New Trial.—Assignment of Error.—Supreme Court —The improper refusal of a continuance is not one of the causes for which a new trial of a criminal case can be granted, but it must be the subject of an independent assignment of error in the Supreme Court.

SAME.—Practice.—Supreme Court.—The settled practice of requiring a specific assignment of all errors relied upon in the Supreme Court in criminal cases, the same as in civil, will not now be departed from.

From the Warren Circuit Court.

C. M. McCabe and *C. V. McAdams*, for appellant.

D. P. Baldwin, Attorney General, and *R. B. Jones*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was prosecuted in the court below, by affidavit and information, for the larceny of a horse. He pleaded not guilty, and on trial was convicted and sentenced to two and a half years imprisonment in the state-prison.

It is assigned for error that the court had no jurisdiction of the cause, and that the court erred in overruling the appellant’s motion for a new trial.

The counsel for the appellant contend that the act in relation to prosecutions of felonies by affidavit and information in certain cases, Acts 1879, p. 143, is unconstitutional. In the case of *Heanley v. The State*, ante, p. 99, we held the act to be constitutional, and we deem it unnecessary to enter upon any further consideration of the question.

The affidavit in this case, after having charged the larceny, proceeds as follows: “And affiant further says that there is no grand jury in session at this term of said Warren Circuit Court, and that the defendant is now in the jail of said county on said charge.”

This, it seems to us, was sufficient to show that the de-

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fendant was in custody on a charge of the offence stated in the affidavit, and that no grand jury was then in session.

The information follows the affidavit in the statement of the offence, and professes to be in the name of the prosecuting attorney, except that in the part in relation to the absence of a grand jury, etc., it says, "and *affiant* further says that there is no grand jury in session," etc.

The information ought to be in the name of the prosecuting attorney, and if a motion to quash had been made, on the ground that the word "affiant" was used in that part of the information, instead of the words "prosecuting attorney," it would seem that the motion should have been sustained, unless an amendment had been made. But we think that, by going to trial without objection, the appellant treated the allegation as having been made by the prosecuting attorney, as was probably intended, and that the objection can not be here raised for the first time, on an assignment of error questioning the jurisdiction of the court.

In the order of proceedings the motion for a new trial appears to have been made after the rendition of judgment. In criminal cases the application for a new trial must be made before judgment. 2 R. S. 1876, p. 409, sec. 143; *Romaine v. The State*, 7 Ind. 63.

We find no error in the record.

The judgment below is affirmed, with costs.

ON PETITION FOR A REHEARING.

WORDEN, J.—In this case the appellant has filed a petition for a rehearing, "for the following reasons, to wit:

"1st. That the court erred in holding the information sufficient; and,

"2d. The court erred in disregarding the question as to the refusal of a continuance."

It was shown in the original opinion, that the information,

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after having charged the larceny, stated as follows: "That there is no grand jury in session at this term of said Warren Circuit Court, and that the defendant is now in the jail of said county on said charge."

The petition now calls our attention to the closing paragraph or prayer of the information, which is in the following words: "Therefore, the said prosecutor prays the consideration of the court here in the premises, and that a warrant be issued for the said defendant in this behalf, that he may answer in the premises."

It is urged by counsel for the appellant, "that if the fair inference from the language of the information is that the defendant is in custody, certainly such inference is overcome by that of the concluding sentence of the information. What need of a warrant for a defendant already in custody? The sentence means nothing unless it is that the defendant must be arrested before he can be brought to answer the charge, and thereby the inference of his custody, if such there is, is wholly destroyed; the information broken down."

We do not think that the prayer of the information can be allowed to control or modify the direct charge or charges contained in the body of it. The prayer did not charge the defendant with any offence, nor state any facts that authorized a trial without indictment. It contained no matter to which the defendant could plead. It was mere form, and, so far as we can see, a useless form. As counsel suggest, it probably meant nothing. It certainly can not be held to have negatived what was directly charged in the body of the information.

We pass to the second point. We have seen that there was no motion for a new trial until after judgment, when the motion came too late.

It may well be doubted whether, in a criminal case, the improper refusal of a continuance can be regarded as one of the causes for which a new trial may be granted. See causes

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for which such new trial may be granted, 2 R. S. 1876, p. 409, sec. 142. If not, it would seem that such refusal ought to be the subject of an independent assignment of error; otherwise the defendant would have no remedy. But, in the present case, there is no assignment of error upon the overruling of the appellant's motion for a continuance. There is no general assignment of error in the record; but there are specific assignments, raising questions as to the sufficiency of the affidavit and information, the jurisdiction of the court over the subject, and the overruling of the motion for a new trial. The question, therefore, as to the supposed error in refusing a continuance, is not before us, unless it is before us without any assignment of error embracing it.

And it is claimed by the counsel that no assignment is necessary. We quote the following passage from the petition, as containing the views of counsel upon the point. They say: "It is true the refusal of a continuance has not been specifically assigned in the assignment of errors. But what statute, what law, rule or regulation, is there, requiring an assignment of errors in criminal cases appealed? The statute provides that upon appeal by a defendant, in a criminal cause, 'any decision of the court or intermediate order made in the progress of the case, may be reviewed.' The refusal of a continuance is an intermediate order, and may be reviewed. When it is specifically assigned as error? No; for such is only the requirement of the civil code, and the civil code does not govern appeals in criminal cases. *The State, ex rel., v. Wallace*, 41 Ind. 445. When such a question appears on the face of the record, and is urged upon the consideration of the court in appellant's argument, then certainly, if ever, such an intermediate order may be reviewed."

If, under a general assignment of error, as that judgment was rendered for the State, when it should have been rendered for the defendant; or if, without any assignment of error at all, this court may consider any question involved

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in the record in a criminal case that may be urged by counsel, the law has not made the progress in the last twenty-eight or thirty years that has been supposed.

The codes of procedure of 1852, both civil and criminal, were intended to remedy some of the evils attendant upon the old system. The civil code provides for a specific assignment of all errors relied upon in this court ; and, though the same provision is not found in the criminal code, it has been the settled practice since its adoption to require a specific assignment of errors in criminal cases, the same as in civil. See Moore's Criminal Law, p. 569, sec. 476 ; Bicknell's Criminal Practice, p. 250. This practice, so long and so thoroughly established, will not now be departed from.

The petition is overruled.

No. 9154.

AVERY v. AKINS ET AL.

PARTITION.—*Title Gained Thereby.*—Partition of lands gives the parties to it no new title to the parts allotted to them in severalty ; but they respectively continue to hold the land by the former title merely divested of the title of their co-tenants.

SAME.—*Judgment.*—*Estoppel.*—*Widow.*—*Descents.*—A judgment in partition between a widow and her children, which allots to her in fee simple a part of the lands of which her husband died seized. to hold “free from any and all claim or demand whatever” of the children of said husband by her, operates only upon existing rights, and will not estop such children from claiming the estate which they would afterwards inherit upon her death, under section 18 of the act concerning descents, 1 R. S. 1876, p. 411.

SAME.—*Conveyance during subsequent Coverture.* of Lands Derived from Deceased Husband.—*Descent.*—A widow with children, to whom is allotted by partition her share in severalty of the lands of her deceased husband, who was the father of such children, can not, during a subsequent

74	283
125	114
126	187
127	85
74	283
130	189
74	283
134	189
136	427
74	283
138	391
74	283
146	403
74	283
148	393
149	420
149	421
149	422
149	485
74	283
155	145
156	570

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marriage, convey the land so allotted to her; and upon her death during coverture such lands will descend, under sec. 18 of the act regulating descents, to the children of the marriage by which she obtained title.

ESTOPPEL IN PAIS AND BY DEED.—A woman, having a child by a former marriage and holding real estate in virtue of that marriage, during a subsequent coverture, attempted to convey the land in fee simple, for a valuable consideration, by deed with full covenants, in which her husband joined. The child, being fully informed of her rights, consented to the conveyance, and upon reaching full age, the mother still being alive, she executed to the purchaser her own deed of quitclaim, without covenants, for the purpose of signifying her consent to her mother's conveyance, and for the purpose of conveying all her present or expectant estate in the land, and of releasing it from any claim or demand by her; and, after her mother's death, she received from her stepfather the amount of the purchase-money which had not been expended by her mother, and which she accepted with knowledge of the source from which it was derived.

Held, that such child was not estopped to set up her title by descent from her mother and to maintain an action for possession of the land.

From the Marion Superior Court.

W. Wallace, L. Wallace, J. T. Dye and W. P. Fishback, for appellant.

A. T. Beck and J. A. Buchanan, for appellees.

WORDEN, J.—Action by the appellees against the appellant, to recover possession of certain real estate in the city of Indianapolis. An answer, reply, and counter-claim were filed.

The court below at general term held that a demurrer to the second paragraph of the replication to the second paragraph of answer should have been overruled; and that a demurrer to the counter-claim should have been sustained.

Without setting out these various pleadings in full, we gather from them the following facts, on which the correctness of the ruling below at general term depends:

In the year 1850 John W. Foudray died intestate, seized in fee simple of certain real estate in Marion county, Indiana, including that in controversy in this suit, leaving a widow and two children, viz.: John E. Foudray, and Milton Foudray.

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The widow of John W. Foudray was entitled to dower in the estate mentioned; but as she is deceased, and as the partition hereinafter mentioned was made subject to her right of dower, her dower interest is of no importance in the case.

The real estate left by John W. Foudray remained undivided until after the death of his son, Milton Foudray, who died intestate, in the year 1855, leaving his widow, Julia A. Foudray, and an only child, Mary E. Foudray, daughter of said Milton and Julia A., the said Mary E. having intermarried with William T. Akins, and being the female plaintiff in the action.

Julia A. Foudray, the widow of Milton, subsequently intermarried with Nathaniel R. Lindsay.

After the intermarriage of her mother with Lindsay, Mary E. Foudray, then a minor, by David V. Cully, her guardian, filed her petition in the court of common pleas of Marion county for the partition of the real estate of which John W. Foudray died seized as above stated, making parties defendants thereto said John E. Foudray, and Nathaniel R. Lindsay and Julia A. Lindsay, formerly Julia A. Foudray, and such proceedings were thereupon had in that court, as that one-half in value of the land was set apart to John E. Foudray, one-quarter to Mary E. Foudray, and one-quarter to Julia A. Lindsay, all subject to the dower above mentioned.

The portion set apart to Julia A. Lindsay is the property in controversy in this action.

The judgment of the court confirming the report of the commissioners making the partition, so far as the part assigned to Julia A. Lindsay is concerned, is as follows, viz.:

“It is therefore ordered, adjudged and decreed by the court, that said Julia A. Lindsay, her heirs and assigns forever, do have, hold, possess and enjoy the premises so set off and assigned to her, free from any and all claim or demand whatever of the said John E. Foudray or Mary E. Foudray or either of them, and any and all persons claim-

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ing from or under them or either of them, but subject to the dower of said Martha Foudray, widow of John W Foudray, deceased." The same judgment was rendered, *mutatis mutandis*, in respect to the other shares.

Afterward, in January, 1864, said Nathaniel R. Lindsay and Julia A., his wife, executed a warranty deed for the premises thus set apart to her, and in controversy herein, to said David V. Cully, for the consideration of \$4,000. And, in November of the same year, the plaintiff herein, then Mary E. Foudray, she having then arrived at the age of twenty-one years, executed a deed for the premises thus set apart to her mother, to said Cully, in the following terms: "This indenture witnesseth, that Mary E. Foudray, of Marion county, State of Indiana, in consideration of five dollars to her paid by David V. Cully, the receipt whereof is hereby acknowledged, doth hereby sell, convey, release and forever quitclaim to said David V. Cully, his heirs and assigns forever, the following real estate in the city of Indianapolis, Marion county, and State of Indiana, described as follows, to wit:" (description) "together with all the privileges and appurtenances to the same belonging."

Afterward, in September, 1865, Cully, by warranty deed and for the consideration of \$8,000, conveyed the premises to Avery, the defendant herein. In 1869, and before the bringing of this suit, Julia A. Lindsay died, leaving her said husband surviving.

The following allegations are contained in the counterclaim, viz.: "That at and before the time of the execution of said conveyance" (the conveyance from Lindsay and wife to Cully), "the said Mary E. Foudray was fully informed of her supposed interest and right in and to said real estate, as daughter of Milton and Julia A. Foudray, and of the execution of said conveyance by her said mother, and at the time consented fully and freely to said conveyance; and particularly, that said Nathan R. Lindsay did in-

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form her of her said supposed rights, and of said conveyance; and that said consideration therefor, to wit, the sum of four thousand dollars, was to be paid, and was paid, to said Julia A. Lindsay; that said Nathan R. Lindsay did ask her consent to such transaction before the execution of said deed of conveyance, and before becoming himself liable upon any covenants of warranty of title in said deed contained; that the said Julia A. Lindsay did ask and request her consent to such transaction before the execution of the same, and before she received the said consideration therefor; that said David V. Cully did request the consent of said Mary E. Foudray to such conveyance, and to the payment of the said Julia A. Lindsay of said consideration therefor; and that said Mary E. Foudray did consent to such conveyance, and did consent that the consideration therefor be paid to her said mother, she, the said Mary, being fully advised of and well knowing her said supposed rights in said premises, the said consideration paid by said Cully to her said mother, and that said consideration was paid for a conveyance in fee simple, and that said conveyance was of the fee simple to said real estate; that said sum of four thousand dollars was so paid by said Cully to said Julia A. for the conveyance as aforesaid, and with the consent and approval of said Mary E. Foudray; that afterward, to wit, on the 7th day of November, 1864, the said Mary E. Foudray, being then of full age of twenty-one years and unmarried, did, for the purpose of signifying her consent to the said conveyance by her said mother to said Cully, and for the purpose of conveying any and all interest present or expectant in said premises, and of releasing said premises from any claim or demand of hers, did sign, seal, deliver and acknowledge, to said Cully, her certain deed of conveyance thereof." (The deed hereinbefore mentioned.) * * * "That said sum so paid by said Cully to Julia A. Lindsay was by her retained, used and controlled during the remainder of her life, free from the influ-

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ence or control of her said husband, and was used by her in charities, in the aid of soldiers and hospitals, and for her own benefit; that on the —— day of ———, 18—, the said Julia departed this life; that on said day of her death there was remaining unexpended of said sum about thirteen hundred dollars; that her said husband, Nathan R. Lindsay, did inform the said Mary of the source from which said sum so remaining was derived, and did pay to said Mary all of said thirteen hundred dollars, and that said Mary, being thus informed, did accept said sum.”

On the foregoing facts the court below, at general term, held, by its decision upon the rulings on the demurrers, that the property belongs to the plaintiff Mary E. Akins; and in this conclusion we fully concur.

We proceed to the consideration of the case, first, without reference to the supposed estoppel arising out of the alleged acts of the plaintiff, and will consider the question of estoppel afterwards.

When John W. Foudray died, his land descended equally to his two sons, John E. and Milton, subject to the dower of his widow.

When Milton died, however, the statute of 1852 had taken effect, and by it his share of the land descended equally to his widow and daughter, there being but one child. 1 R. S. 1876, p. 412, sec. 23. The 18th section of the same statute provides, that “If a widow shall marry a second or any subsequent time holding real estate in virtue of any previous marriage such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if, during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be.”

Julia A. Foudray, afterwards Julia A. Lindsay, held the property in controversy, in virtue of her marriage with

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Milton Foudray, and she held it subject to the restriction provided for by section 18 above quoted. She could not alienate it during her subsequent marriage; and, having died during that marriage, the property went, by virtue of the statutory canon of descent, to the plaintiff, Mary E., the child of the marriage in virtue of which her mother received and held it.

But it is urged by counsel for the appellant, that, after the partition, Julia A. Lindsay held the property in virtue of the judgment of partition, and not in virtue of her marriage with Milton Foudray, and, therefore, that she held it free from the restriction of section 18, and could alienate it during her subsequent marriage. This argument, urged with much ingenuity and plausibility, seems to us to be destitute of foundation. If the argument is well founded, a widow entitled, as is usually the case, to one-third of her husband's land, upon his decease, after getting her share set off to her by partition, holds it free from the restriction of section 18, and may alienate it during any subsequent marriage. After the partition Mrs. Lindsay held the portion set apart to her by the same title by which she held the undivided share before partition. She held it by descent from her former husband, and not by purchase. The effect of the partition was to sever the respective shares, and not to change the source of title. This point was considered in the case of *Doe v. Dixon*, 5 A. & E. 834, in which LORD DENMAN, C. J., said: "In this case one of two parceners alienated his moiety in fee, whereby the alienee and the remaining parcener became tenants in common. Afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question is whether by that deed the parcener took any thing as purchaser, so as to break the descent ex parte ma-

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terna, and to let in the heir ex parte paterna on the death of the parcener. It is admitted that, if the deed of partition had been between the parcnere themselves, the descent would not be broken; *Com. Dig. Parcnere*, (C. 15). But it is said that, inasmuch as one of the parties to the deed was a stranger in blood, whatever was taken from him by the parcener must be taken by purchase. And doubtless this would be so if any thing was taken from him: but we are of opinion that nothing was taken by the parcener from the alienee under the deed. The effect of it was only that the parcener had by it a divided moiety in severalty discharged from any right in the alienee, instead of an undivided moiety in common; but he had the same estate in the land as before."

In *Wade v. Deray*, 50 Cal. 376, it was held to be "well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition, each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one." See also *Knight v. McDonald*, 37 Ind. 463, and *Teter v. Clayton*, 71 Ind. 237.

But appellant insists that the particular judgment in the partition suit cuts off the right of the plaintiff to the property; but this position is as untenable as the other.

The judgment, doubtless, cut off any right or supposed right which the plaintiff then had in the share set off to Mrs. Lindsay; but it did not in any manner affect any right that she might afterwards acquire to that share. The judgment dealt with then existing rights, and none other. The right which the plaintiff now sets up to that share did not exist at the time of the partition, but has accrued since.

By the descent and the partition, Mrs. Lindsay became vested with the fee simple to the share set off to her, discharged of any then existing claim of the plaintiff to it, but

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the partition could not enable her to alienate it during her marriage, nor could it control the law of descent and determine who should inherit the property in case she should die during that marriage. Mrs. Lindsay took the fee with the right of alienation at any time that she might be free from coverture. Had she survived Mr. Lindsay, she could have conveyed the fee. See *Small v. Roberts*, 51 Ind. 281; *Piper v. May*, 51 Ind. 283; *Nesbitt v. Trindle*, 64 Ind. 183; *Sebrell v. Hughes*, 72 Ind. 186.

The deed executed by Mr. and Mrs. Lindsay to Cully was rendered absolutely void by the 18th section of the statute. *Newby v. Hinshaw*, 22 Ind. 334; *Vinnedge v. Shaffer*, 35 Ind. 341; *Mattox v. Hightshue*, 39 Ind. 95; *Bowers v. Van Winkle*, 41 Ind. 432; *Edmondson v. Corn*, 62 Ind. 17.

The result is that the title remained in Mrs. Lindsay until her death, when the property descended to the plaintiff as the child of the marriage in virtue of which her mother held it.

We come to the supposed estoppel. The deed executed by the plaintiff Mary E. was but a quitclaim deed. The words therein, "to said David V. Cully, *his heirs and assigns forever*," do not make it anything more than a quitclaim deed. If she had had the fee to convey, then these words would have operated to convey that quantity of estate. But she then had no estate in the premises whatever, nor did her deed affirm, directly or by any necessary implication, that she had. It is well settled that such a deed will not estop her to set up her title afterward acquired. *Van Rensselaer v. Kearney*, 11 How. 297; *Shumaker v. Johnson*, 35 Ind. 33; *Nicholson v. Caress*, 45 Ind. 479; *Graham v. Graham*, 55 Ind. 23.

But it is alleged that the plaintiff consented to the conveyance of the property to Cully by her mother and her mother's husband, and to the receipt by her mother of the purchase-money; and that she, after her mother's death, received from Mr. Lindsay \$1,300 of the purchase-money, knowing the source from which it came.

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It is alleged in the counter-claim filed by the defendant, that Cully, the plaintiff's guardian, requested the plaintiff to consent to the conveyance to him of the property by Lindsay and wife.

This attempted conveyance was made for \$4,000. Within less than two years from that time, Cully sold it to the defendant in this action for \$8,000. The property may, however, have rapidly risen in value in the meantime.

We do not think the receipt by the plaintiff Mary E., of the \$1,300, estops her to set up her title derived by descent from her mother. She steps into the shoes of her mother in respect to the title; that is, she takes whatever title her mother had. Her mother could not have been estopped by the receipt of the purchase-money to set up the invalidity of her deed to Cully; for, if she could, it would work a substantial abrogation of the interdict upon alienation during a second or subsequent marriage, contained in the 18th section. If her mother could not have been estopped by the receipt of the purchase-money, it would seem to follow that the mere transmission of the money from the mother to the plaintiff could not work the estoppel.

Beyond what has been noticed, there is nothing in the case that has any of the elements of an estoppel.

The plaintiff consented to the conveyance by Lindsay and wife to Cully; but she practiced no fraud, deception or concealment upon any one.

As was said by the Supreme Court of Wisconsin in the case of *Edwards v. Evans*, 16 Wis. 193, "It would be most unreasonable to exclude a party from showing his title because of his participation, without fraud or deception, in a transaction notoriously void, from which it was well known no legal or equitable right could arise. The case seems entirely destitute of the essential elements of an estoppel."

The judgment below at general term is affirmed, with costs.

Petition for a rehearing overruled.

Sumner v. Goings.

No. 7336.

SUMNER v. GOINGS.

74	293
133	390
74	293
151	533

PRACTICE.—*Supreme Court.*—*Transcript, How Corrected.*—A transcript in the Supreme Court, if defective, can only be corrected by a *certiorari*.
SAME.—*Appeal.*—*Record.*—*Complaint.*—*Answer.*—Unless the record on appeal contains a copy of the complaint, the Supreme Court can not determine the sufficiency of an answer thereto.

From the Jasper Circuit Court.

W. C. Wilson, J. H. Adams, C. H. Test, J. Coburn, S. P. Thompson and T. Thompson, for appellant.

J. N. Templar, R. Gregory, D. E. Straight and U. Z. Wiley, for appellee.

WOODS, J.—The appellee sued the appellant on a complaint in one paragraph, to which a second paragraph was afterward added. The appellant's demurrer was sustained to the first paragraph and overruled as to the second, to which he filed an answer in twelve paragraphs, to the tenth, eleventh and twelfth of which the demurrer of the appellee was sustained. To so many of these rulings as were adverse to him, and to the giving and refusing of certain instructions, the appellant saved exceptions, and has assigned errors which bring them under review. The second paragraph of the complaint is not in the record. The appellant, after filing his transcript, presented what he claimed to be a certified copy of the omitted paragraph, and moved to have it treated as a part of the record, but the motion was overruled on May 7th, 1879, on the ground that a "transcript can be corrected only by a *certiorari*;" and no step has been since taken for the purpose of supplying the omission.

In this condition of the record, it is impossible for us to know what kind of a case was tried; whether the complaint was good or bad, or whether the instructions given and refused were relevant and proper or the contrary. It must be equally clear that we can not determine the sufficiency of the

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answer without knowing the contents of the complaint to which it was addressed. These particular answers set up the six and the twenty year statute of limitations, but there may be causes of action so presented as that no limitation will apply; as, for instance, in certain cases for the enforcement of trusts. See *Heizer v. Kelly*, 73 Ind. 582; *Albert v. The State, ex rel.*, 65 Ind. 413; *Earle v. Peterson*, 67 Ind. 503; *Potter v. Smith*, 36 Ind. 231.

Judgment affirmed, with costs.

No. 7191.

EDWARDS v. POWELL.

PRACTICE.—New Trial.—Evidence.—Error of the court in permitting the introduction of evidence is “error of law occurring at the trial,” and when excepted to at the time constitutes cause for a new trial, in a motion therefor addressed to the trial court.

SAME.—Assignment of Error.—Matter constituting cause for a new trial can not be assigned as error for the first time in the Supreme Court, and, if so assigned, will present no question for decision.

GUARDIAN AND WARD.—Sale of Real Estate.—Deed by Commissioner.—Evidence of Confirmation of Sale.—A deed, made by a commissioner appointed by the court for that purpose, upon the sale of a ward’s real estate, under a petition therefor by his guardian, is proof sufficient, in the absence of any evidence to the contrary, that such sale was reported to and approved by the court.

From the Montgomery Circuit Court.

S. C. Willson and *L. B. Willson*, for appellant.

H. M. Billings, for appellee.

Howk, J.—This was a suit by the appellant against the appellee, to recover the possession of certain real estate, particularly described, in Montgomery county, and damages for

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being kept out of the possession. The appellant's complaint was in the ordinary statutory form in such cases; and the appellee answered by a general denial of the complaint. On the second trial of the cause by the court, a finding was made for the appellee, the defendant below; and the appellant's motion for a new trial having been overruled, and his exception saved to this ruling, the court rendered judgment against him for the appellee's costs.

Upon the record of this cause, the appellant has assigned errors, as follows:

1. The court erred in permitting the appellee to introduce in evidence the petition for the sale of real estate, of John Small, guardian of said Eli H. Edwards, filed in the court of common pleas of Montgomery county, the report of appraisers, the decree of sale, and the deeds of the commissioner appointed in pursuance of said decree; and,

2. The court erred in overruling appellant's motion for a new trial.

1. The matter stated in the first alleged error would have constituted a proper cause for a new trial, in the motion therefor addressed to the trial court. If it was error to permit the introduction of the evidence mentioned, it was an error of law occurring at the trial, and, if excepted to at the time, constituted the eighth statutory cause for a new trial. It was not assigned by the appellant, as a cause for a new trial, in his motion therefor; and it can not be assigned for the first time, in this court, as an independent error. It is settled by the decisions of this court, that matter constituting a proper cause for a trial, in a motion therefor in the trial court, can not be assigned in this court as error; and, if so assigned, it will present no question for the decision of this court. *Buskirk's Practice*, 126, and cases cited; *Freeze v. DePuy*, 57 Ind. 188; *Wiley v. Barclay*, 58 Ind. 577; and *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56. The appellant's counsel have devoted the greater portion of their

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elaborate brief of this cause to the discussion of the matters complained of in the first supposed error ; but the questions are not properly before this court, and we do not consider them.

2. In his motion for a new trial, the appellant assigned, as causes therefor, that the finding of the court was contrary to law, and that it was not sustained by sufficient evidence. The appellant's counsel claim, that the evidence was not sufficient to sustain the finding of the court, because it did not show that the commissioner, who made the sale of the real estate under the petition of the appellant's guardian, had complied with the provisions of section 21 of the act of June 9th, 1852, touching the relation of guardian and ward. In that section, it is provided that, "At the term of the court next after such sale, such guardian or commissioner shall make report thereof to such court, and produce the proceeds of sale, and the notes or obligations, or other securities taken to secure the payment of the purchase-money." 2 R. S. 1876, p. 597. Counsel claim that the report of sale provided for in this section of the statute was for confirmation, and that, without such confirmation, no deed could be held valid. It is true, that no formal written report of sale appears to have been made, but it seems to us that the deeds in evidence, which were made by a commissioner appointed by the court for that purpose, were proof sufficient, in the absence of any evidence to the contrary, that the sales were reported to, and approved by, the court. We can not disturb the finding of the court on the evidence.

We find no error in the record.

The judgment is affirmed, at the appellant's costs.

Opinion filed at November term, 1880.

Petition for a rehearing overruled at May term, 1881.

Shipley v. The City of Terre Haute et al.

No. 7268.

SHIPLEY v. THE CITY OF TERRE HAUTE ET AL.

CITY.—*Liability of, as Stockholder in Railroad Company.—Work and Labor.*
—A city, having subscribed to the stock of a railroad company, under the act of May 4th, 1869, authorizing cities to aid in the construction of railroads, 1 R. S. 1876, p. 299, is bound by the same liability which, under section 38 of the act for the incorporation of railroad companies, 1 R. S. 1876, p. 712, attaches to an ordinary stockholder in such company for labor done in the construction of its road.

CONSTITUTIONAL LAW.—*Title of Act.*—Section 38 of said act for the incorporation of railroad companies is constitutional, its provisions being matter properly connected with the subject of the title of such act, within the meaning of section 19, article 4, of the constitution.

From the Vigo Circuit Court.
W. Eggleston and N. G. Buff, for appellant.
T. W. Harper, for appellees.

WOODS, J.—The demurrer of the appellees was sustained to the complaint, and judgment rendered accordingly. The defendant, the City of Terre Haute, alone was served with process from the court below, and the only question urged upon our attention is, whether the complaint shows a good cause of action against said city. The purpose of the action was to charge the city and other defendants for labor done in the construction of the railroad of the Cincinnati and Terre Haute Railway Company, of which the defendants were the stockholders at the time the labor was done. We find it unnecessary to set out a copy of the complaint, or to give special consideration to its allegations, as no defect is claimed which could be supplied by an amendment. The whole contention of the counsel on either side is upon the question, whether a municipal corporation, organized under the general laws of the State for the incorporation and government of cities, is bound by the same liability which, under the 38th section of the “Act to provide for the incorporation of railroad companies,” approved May 11th, 1852, attaches to an ordinary stockholder in such company. The

74	297
145	459
74	297
158	699
74	297
157	827
74	297
166	198
74	297
171	668

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city made her alleged subscription of stock in September, 1871. The section of the law referred to is as follows :

“Sec. 38. The stockholders shall be individually liable to laborers, their executors, administrators and assigns, for all labor done in the construction of said road, that shall remain unpaid after the assets of the corporation shall have been exhausted.” 1 R. S. 1876, p. 712.

By an act approved May 4th, 1869, it was enacted, “That any city, incorporated under the general law of this State, upon petition of a majority of the resident freeholders of such city, may hereafter subscribe to the stock of any railroad, hydraulic company, or water power, running into or through such city, or near the corporate limits of said city, * * * * subject, however, to the limitations, direction and restriction named in the provisos to the sixtieth section of the act entitled ‘An act to repeal all general laws now in force for the incorporation of cities, prescribing their powers and rights,’ ” etc, approved March 14th, 1867. The provisos referred to contain nothing pertinent to our present inquiry. 1 R. S. 1876, p. 299.

These provisions of the law seem to be so plain and direct to the point as to leave little room for debate upon the question presented for decision. The counsel for the appellee has favored us with an elaborate brief, wherein he argues that the city defendant is not subject to the individual liability which is imposed on the individual stockholder. The argument turns entirely upon the following propositions, advanced by the counsel, namely :

“1st. That the liability of municipal corporations must appear in their charter, that being the instrument from which their power to become stockholders is derived ; if no liability is authorized to be incurred or created by the charter, then none exists.

“2d. That the section of the railroad act above set out is unconstitutional, because the subject-matter thereof is not

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expressed in the title of the act, nor does it relate to a subject properly connected therewith.”

We do not question the accuracy of the first proposition, but its application leads us to a conclusion directly the opposite of that for which the appellees contend. By the act of May 4th, 1869, the Legislature made an express grant to the defendant of the power to become a stockholder in a railroad company. So far as in their nature they could be exercised or enjoyed, it is clear that the rights and privileges of an ordinary stockholder belonged to the city when it became a stockholder as alleged; and it seems to be equally clear that, in conferring the power to acquire the rights and benefits, the Legislature must have intended to impose the attendant burdens. Indeed, the right conferred has no legal existence or definition apart from the duties and obligations expressly connected therewith.

It is true, as suggested, that the city could not become the president, director, or other officer or agent of the railroad company, and, it may be, could not be counted as one of the “number of persons, not less than fifteen, being subscribers to the stock of any contemplated railroad,” which the 1st section of the general railroad law requires, in order to form a railroad corporation. But it is plain that these things are not essential to, and inseparable from the fact of, membership in the corporation. They are essentials to the corporate existence, but not to membership therein. The shareholder may or may not be the president or director; but he can not have a shareholder’s common rights, and not be subject to the common liabilities, unless there is in the law some warrant for the exception. The act of December 17th, 1872, “to require railroad companies to issue stock paid for by taxes,” etc., in certain specified cases, contains an express proviso, “that the stock so issued under the provisions of this act, being involuntary in its character, no personal liability shall attach to the original holder thereof

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for any debt contracted by the railroad company.” A similar proviso should, and doubtless would, have been embodied in the act of May 4th, 1869, if the Legislature had intended a like exemption from liability on the part of such cities as should avail themselves of the powers conferred by that act. In this respect there is some analogy between this case and the case of *Gray, Governor, v. The State, ex rel. Coghlen*, 72 Ind. 567, wherein the court, in considering the rate of interest which the creditor of the State was entitled to receive on his bond (one of the internal improvement bonds of 1836), says: “We see no reason why the State, as a debtor, should be placed in any other or different situation, as to its obligation to pay interest, than that occupied by any private debtor or other public corporation. 1 Dan. Neg. Instr., sec 436; *Murray v. Charleston*, 96 U. S. 432. In the case last above cited the court said: ‘The truth is, States and cities, when they borrow money and contract to pay it with interest, are not acting as sovereignties; they come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons.’ ”

It has been held that if a sovereign State, which can not be sued without its own consent, has voluntarily rendered itself liable to a private action, and if it has become a stockholder in a private corporation, it has subjected itself to the same liabilities which attach to any private stockholder. *Curran v. The State*, 15 How. 304; *Robinson v. The Bank of Darien*, 18 Ga. 65; Thompson Liability of Stockholders, sec. 20; Morse Banks, etc., pp. 516–518; *National Bank v. Case*, 99 U. S. 628. In the case last cited, the Germania Bank held, as collateral security for money loaned, shares of stock in the Crescent City National Bank, of New Orleans, and, the latter bank having become insolvent, was held subject to the liability of a stockholder, the court, among other things, saying: “There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a

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loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But, if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action." And much less can the appellee escape the responsibility of having taken stock which the law expressly authorized it to take.

In support of his proposition that the 38th section of the act for the incorporation of railroad companies is unconstitutional, after quoting section 19, article 4, of the constitution, the counsel for the appellee cites and comments on the following cases: *The State v. Young*, 47 Ind. 150; *The State v. Wilson*, 7 Ind. 516, *Foley v. The State*, 9 Ind. 363; *Gillespie v. The State*, 9 Ind. 380; *Mewherter v. Price*, 11 Ind. 199; *The State v. Bowers*, 14 Ind. 195; *Igoe v. The State*, 14 Ind. 239; *Spaugh v. Huffer*, 14 Ind. 305; *Grubbs v. The State*, 24 Ind. 295; *The Town of Fishkill v. Fishkill, etc., P. R. Co.*, 22 Barb. 634; *The People v. Allen*, 42 N. Y. 404; *The People v. Hills*, 35 N. Y. 449; *The People v. O'Brien*, 38 N. Y. 193; *The City of San Antonio v. Gould*, 34 Tex. 49; *Prothro v. Orr*, 12 Ga. 36; *Cutlip v. Sheriff of Calhoun County*, 3 W. Va. 588; *The People v. Commissioners, etc.*, 53 Barb. 70; *Gaskin v. Anderson*, 7 Abb. Pr. (N. S.) 1; *Gaskin v. Meek*, 8 Abb. Pr. (N. S.) 312; *Settle v. Van Evrea*, 49 N. Y. 280.

Without taking the time to make a statement of the scope and bearing of these cases, as we should hardly be justified in extending our opinion to the length necessary for that purpose, we content ourselves with saying that they do not require us to accept, nor would they justify us in adopting, the conclusion for which counsel contends. The constitutional provision is, that "Every act shall embrace but one subject and matters properly connected therewith; which subject shall be expressed in the title. But if any subject

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shall be embraced in an act, which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." 1 R. S. 1876, p. 30. The title of the act in question is, "An act to provide for the incorporation of railroad companies." The incorporation of railroad companies is the "one subject" of this act, and we entertain no doubt that it was "matter properly connected therewith" to provide for the individual liability of the stockholders in such companies as should be organized under the law. It is only the "one subject" which must be expressed in the title.

We hold, therefore, that the complaint is good as against the objections which have been brought to our attention, and consequently that the circuit court erred in sustaining the demurrer thereto.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint.

Petition for a rehearing overruled.

74	302
129	470
74	302
141	365
74	302
159	411

 No. 7463.

STRATTON v. KENNARD ET AL.

VENDOR AND PURCHASER.—*Purchase-Money of Real Estate.*—*Defence on Failure of Title.*—In the absence of covenants of warranty or for title, or proof of fraud, a failure of title is no defence to an action for the purchase-money of real estate.

PRESUMPTION.—*Instructions.*—*Evidence.*—*Practice.*—Where the evidence is not in the record, instructions will be presumed to be correct if applicable to any supposable state of the evidence.

PRACTICE.—*Bill of Exceptions.*—*Evidence.*—Written instruments or documentary evidence may be incorporated in a bill of exceptions by indicating the place where they are to be inserted by the words "here

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insert," but the only way in which oral testimony can be properly got into a bill of exceptions is by copying it therein at full length before the bill is signed by the judge.

From the Henry Circuit Court.

M. L. Bundy and *M. E. Forkner*, for appellant.

J. H. Mellett and *E. H. Bundy*, for appellees.

ELLIOTT, J.—This was an action upon a promissory note which the appellant, Edward K. Stratton, had executed to appellees in part payment for a tract of land purchased from them as executors of Tidamou Jessup, deceased. Judgment was rendered, on the verdict of the jury, in favor of the appellees, who were plaintiffs below, for the full amount of the note and interest, over motion for a new trial by defendant. From this judgment defendant appeals, and assigns as errors :

1st. The ruling sustaining a demurrer to the second paragraph of his answer.

2d. The ruling denying his motion for a new trial.

The second paragraph of the answer avers that "the note on which this suit is brought was given in part consideration of a tract of land, purchased by the defendant of the plaintiffs; that the plaintiffs have no title to the land sold, and can make no valid conveyance therefor, wherefore defendant says the consideration of said note has failed, and this he is ready to verify." This paragraph is bad, and the demurrer was properly sustained. It is well settled, that in the absence of covenants of warranty or for title, or proof of fraud, a failure of title is no defence to an action for the purchase-money of real estate. *Laughery v. McLean*, 14 Ind. 106; *Cartright v. Briggs*, 41 Ind. 184; *Barkhamsted v. Case*, 5 Conn. 528.

Counsel for the appellant insist that the court erred in overruling the motion for a new trial. In support of this position it is asserted that two of the instructions given by the court were erroneous. The argument upon this point

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can avail nothing, because the evidence is not in the record. It is well settled that where the evidence is not in the record, instructions will be presumed to be correct if applicable to any supposable state of the evidence.

There was an attempt to carry the evidence into the record by a bill of exceptions, but the course pursued was not one which the code or common law practice warrants. Prior to the adoption of our present code, even written instruments could only be got into a bill by being copied therein at full length before the signature of the judge was appended. *Irwin v. Smith*, 72 Ind. 482. Since the adoption of the code, written instruments may be incorporated by proper reference, and by indicating the place where they are to be inserted by the words "here insert." The provision of the code applies only to written evidence, and can not be held to embrace oral testimony; the latter must be written in the bill before the judge signs it. *Stewart v. Rankin*, 39 Ind. 161; *Cluck v. The State*, 40 Ind. 263. The bill of exceptions, as signed by the judge, was a mere skeleton, containing, at the place where the appellant desired the evidence given on the trial to be inserted, these words: "Here insert the evidence taken down by Saint." This was clearly insufficient. To permit such a practice would result in confused records, and lead to almost interminable discussions as to whether the evidence was in the record in each particular case. The only way in which oral testimony can be properly got into the bill of exceptions is by copying it at full length before the judge attaches his signature. We are not now, we add to prevent possible misunderstanding, referring to reports of evidence made by stenographers under the provisions of the statute upon that subject.

Judgment affirmed.

Brown v. Yaryan *et al.*

No. 7517.

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74	305
125	399

GUARDIAN AND WARD.—*Custody.—Education.—Support.—When Duty to Keep Ward Employed.*—A guardian is entitled to the custody of his wards, and it is his duty to provide for their education; and when of limited fortune, and able to earn their support, it is his duty to keep them so employed rather than to allow them to remain in idleness or expend their limited patrimony.

CONTRACT.—*Evidence.—Member of Family.—Insufficiency of Evidence to Sustain Finding.*—Upon a trial, in an action to recover for work and labor, the evidence showed that the plaintiff, while under guardianship, went to live with the defendant, her uncle, under an agreement made with him by her guardian that she should live with him as a member of his family, and be boarded, clothed and educated by him; that nothing was said about wages or pay; that under this agreement she continued to live with the family until her majority, and until her marriage, eight years thereafter, never asking or demanding wages or pay for her services, the defendant providing for her support and treating her substantially as a member of his family; that, from the time of her majority until shortly before her marriage, she had loaned her money to her uncle, he paying her interest therefor, and that upon settlement with him she had allowed him a certain sum for clothing furnished her. *Held*, that the evidence was insufficient to entitle the plaintiff to recover.

From the Madison Circuit Court.

C. L. Henry, H. D. Thompson and W. S. Diven, for appellant.

W. R. Pierse, J. B. Julian, J. T. Julian and R. Collins, for appellees.

MORRIS, C.—The appellees sued the appellant for services rendered him by the appellee Mary J. They allege in their complaint that said Mary J. went to live with the appellant in 1861, as a servant girl, and that she continued to live with and work for the appellant until 1876, when she married the appellee John B. Yaryan; that her services were worth \$2,081.

The appellant demurred to the complaint. The demurrer was overruled, and he excepted. The appellant then an-

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swered the complaint by a general denial. He also pleaded payment, and in a third paragraph of the answer he states that in 1861 the grandfather of the said Mary J., with whom she had been living, died, and that she then came to live with him as a member of his family, and that she so continued to live with him until 1876, when she was married to her co-appellee; that the appellant, during the time said Mary J. lived with him, treated her as a member of his family, sending her to school and furnishing her clothing, attention and care, as if she had been his daughter.

The appellees replied in denial of the second and third paragraphs of the appellant's answer. The cause was submitted to the court for trial. Finding and judgment in favor of the plaintiffs for \$350.

The appellant moved the court for a new trial, upon written reasons filed, as follows:

1st. That the finding of the court is contrary to the evidence;

2d. That the finding of the court is contrary to law.

The motion for a new trial was overruled, and the appellant excepted. The errors assigned are:

1st. That the court below erred in overruling the demurrer to the complaint;

2d. In overruling the appellant's motion for a new trial.

The appellant waives the first error, but insists that the court erred in overruling his motion for a new trial. It is claimed by the appellant that there is no conflict in the testimony; that it shows conclusively that the appellee Mary J. Yaryan was his niece; that she lived with him as a member of his family, and as such performed the labor mentioned in the complaint.

The appellee Mrs. Yaryan was a witness in her own behalf. She testified that she went to live with appellant, who was her uncle, on the 1st of August, 1861; that she worked for him until she was twenty-one years of age; that the

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appellant furnished her clothes, boarded her, and sent her to school some; that she attended school four different terms, not regularly nor all the time; that she did not have the opportunities to attend school that other girls in the neighborhood had; that the appellant's family consisted of seven members; that she did most of the house work, Mrs. Brown, the appellant's wife, being sick most of the time; that the appellant had no other help in his house; that she and one of the appellant's boys milked four, and sometimes twelve, cows. She was about fourteen years of age when she went to live with the appellant; that after she attained her majority her guardian, William Webb, settled with her, paid her her share of her grandfather's estate, charging her some fourteen dollars for a doctor's bill, paid for medical attendance upon her the winter after she went to live with the appellant; that after she became of age she continued to live with and work for the appellant as before, loaned him her money, for which he agreed to, and did, pay her ten per cent. interest; that when he settled with her for the money loaned him, and interest, she allowed him ninety-three dollars for clothing; that when she was married he gave her no outfit; that she got her wedding clothes and procured them to be made herself; that she was not treated altogether as one of the family; that her uncle, the appellant, always treated her kindly, but that his wife and sons sometimes mistreated her. She does not testify to any contract between her and her uncle as to wages, nor to any promise on his part to pay her for her labor, except that he had promised to give her a cow, but did not; that her services were worth two dollars per week.

William Gray, a witness called by the plaintiff, testifies that he was acquainted with the parties; that he had boarded at the appellant's house; that the appellee did a great deal of hard work; that in some respects the appellee was treated kindly,

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but she was treated more like a servant than a member of appellant's family, though in what respect he could not say.

William Webb testifies that he was the guardian of the appellee Mary J. ; that the agreement between him and the appellant was, that Mary should live with appellant as a member of his family, be treated as one of the family, have schooling, and be treated in every respect as one of the family ; that there was never any different arrangement made in regard to her living with the appellant.

The appellant testified that the appellee Mary J. was his niece ; that her guardian, William Webb, brought her to his house in August, 1861, and asked him to take her and keep her as one of his family ; that he agreed to take her as a member of his family, board her, clothe and school her, as he would were she his own child. That he clothed her well, as well as other girls in the neighborhood were clothed, and sent her to school as he did his own sons. That he wished her to go to school more than she did, but that she refused to do so. That he took her to church and fairs as he would his own child, and as a member of his family. That her clothing was procured and paid for as was the clothing of the other members of the family. That there never was any contract between Mrs. Yaryan and himself as to wages ; that he never agreed or promised to pay her any thing for services, and that she never demanded wages or mentioned such a thing until after she had left and married John B. Yaryan. That he always treated her kindly, and as a member of his family. Other witnesses were called, whose testimony supported that of the appellant. The appellant insists that the finding and judgment of the court are not only without support from the evidence, but against the uncontradicted testimony in the case.

The testimony of the guardian and of the appellant, the only witnesses who testify as to the terms upon which the appellee Mrs. Yaryan went to live with the latter, is in

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complete agreement. They both swear that she was to live with him as a member of his family, to be boarded, clothed and educated as one of his family. Upon this agreement with the guardian the appellant took the appellee, boarded, clothed and schooled her. This was the only arrangement made. There was nothing said about wages or pay; no agreement or promise on the part of the appellant to pay the appellee for her labor; no demand by her at any time for pay. When she attained her majority she came into possession of \$800, which she loaned to the appellant at ten per cent. She then says she continued to live with the appellant for eight years, never asking or demanding wages or pay for her services; that her uncle furnished boarding, clothing and support as before. With this agrees the testimony of the appellant and all the witnesses. There is some conflict, it is true, in the testimony of the witnesses as to the amount of work which the appellee performed, and as to whether she had received sufficient schooling, and as to the conduct of some of the members of the appellant's family toward her. She says that her uncle always treated her with kindness; that some times the boys got mad and swore at her; that Mrs. Brown also got mad at her and beamed her. But as to the relation which Mrs. Yaryan sustained to the appellant there is no conflict, but entire harmony. It is impossible to resist the conclusion that she regarded herself, and that she was regarded by the appellant and his family, as a member of the family, and not as a servant working for wages. *Webster v. Wadsworth*, 44 Ind. 283; *Oxford v. McFarland*, 3 Ind. 156; *Cauble v. Ryman*, 26 Ind. 207; *King's Adm'r v. Kelly*, 28 Ind. 89; *Hays v. McConnell*, 42 Ind. 285; *Smith v. Denman*, 48 Ind. 65; *Hall v. Finch*, 29 Wis. 278; *Garner v. Gordon*, 41 Ind. 92.

The appellees insist, however, that the payment by Webb, the guardian, of \$14 for medical services rendered Mrs. Yaryan, in the winter of 1861-2, and the payment of \$93

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by her to the appellant, are conflicting circumstances of such weight as to require, under the decisions of this court, the affirmance of the judgment below. But the payment of the \$14 is so explained by the guardian as to harmonize the fact with the views of the appellant. He says that he paid it because, in view of the arrangement made with the appellant for the support of his ward, he deemed it just to do so; that, as she was taken sick so soon, he ought to pay it.

Nor was the fact that in settlement with the appellant, for the use of her money, just before Mrs. Yaryan left his house, she allowed him \$93 on clothes, inconsistent with the fact that she had lived with him as a member of his family. She was then twenty-nine years of age, and, had she thought herself entitled to wages at all, it must have occurred to her that they had been long due and long withheld. She made no claim of the kind, but, regarding herself as the debtor of her uncle, paid the \$93. It can not be said, we think, that this circumstance is inconsistent with the agreement made between the appellant and the guardian of Mrs. Yaryan, upon which all parties seem to have acted.

It is also said by the appellees, that it was not competent for the guardian of Mrs. Yaryan, as such, to enter into this arrangement with the appellant for her support; that it was a contract to bind the appellee to the appellant as an apprentice until she became of age. The arrangement was not, however, that Mrs. Yaryan should remain with the appellant until she attained her majority, but that she should live with him as a member of his family, without any fixed time.

The guardian was entitled to the custody of his ward. It was his duty to provide for her education, and she being able to earn her support, in view of her limited fortune, it was his duty to see that she did it, rather than to allow her to remain in idleness or to expend her limited patrimony. The rule is, that the guardian should keep his ward employed.

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in earning its support. *The State, ex rel., v. Clark*, 16 Ind. 97; Schouler Domestic Relations, 455.

The evidence does not, we think, entitle the appellees to a judgment. It did not prove an agreement to pay her wages, but did prove the contrary.

The judgment should be reversed.

PER CURIAM.—It is ordered that, upon the foregoing opinion, the judgment below be in all things reversed, at the costs of the appellees.

No. 9339.

TUTTLE v. CHURCHMAN ET AL.

REAL ESTATE.—*When Deed Absolute Treated as Mortgage.*—*Security.*—A deed of realty, though absolute on its face, will be treated in equity as a mortgage only, if the purpose of its execution was to secure the payment or discharge of an existing debt or liability.

SAME.—*Possession Constructive Notice.*—As a general proposition, the possession of real estate is constructive notice to all the world of the rights of the party in possession.

SAME.—*Exception to Rule.*—*Grantor's Possession after Conveyance.*—The fact that a grantor remains in possession of his land after conveying it away by a deed absolute on its face is not constructive notice to purchasers of a judgment against the grantee, of the grantor's right to have his deed treated as a mortgage.

SAME.—*Innocent Purchasers of Judgment against Grantee.*—*Superior Right.*—Purchasers of a judgment against a grantee which, by the records, appears to have become a lien on land conveyed by a deed absolute on its face, having expended their money upon the faith of that appearance, paying the full amount thereof in ignorance and without notice of the fact that the deed was only a security, or claimed as such, acquire a right superior to the right of the grantor acquired by a reconveyance of the lands and by actual continued occupation thereof.

From the Marion Superior Court.

74	311
124	119
74	311
136	658
74	311
139	630
74	311
144	182

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D. V. Burns and *C. S. Denny*, for appellant.

J. S. Tarkington, for appellees.

WOODS, J.—The appellant, Tuttle, brought an action to quiet the title to real estate against a judgment lien asserted by the appellees, Churchman and Fletcher. The suit was begun in Johnson county, where the real estate is situate, and transferred by agreement to the superior court, wherein, at special term, there was a finding and judgment for the plaintiff, which was reversed at general term. This reversal is assigned as error. While some exceptions were saved in reference to the admission of some portions of the evidence, the real dispute is whether the decision and judgment of the court at special term, upon the proofs made, was right. We have, however, examined the evidence carefully, giving especial attention to the portions which were admitted over objection, and think the court committed no error in admitting any part thereof. But whether the court reached the right conclusion upon the whole case, is a question not free from difficulty, and involved in some conflict of authority.

The following summary of the facts proved, about which we may say there is little or no dispute, will be sufficient to afford an understanding of the questions presented, and of the conclusions of the court thereon.

On the 26th day of April, 1877, the plaintiff was the owner in fee and in possession of a certain tract of land in Johnson county, Indiana, subject to a mortgage to secure the payment of three promissory notes for one thousand two hundred dollars each, executed by the plaintiff, as principal debtor, and by Jacob Smock, the father-in-law of the plaintiff, as surety; and said Smock having paid two of said notes, and being still liable on the third, the plaintiff on said day made to him a deed of said land, absolute on its face, and upon the consideration of \$3,750, therein stated to have been paid, but intended by the parties only as a security against said liability,

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and for the repayment of the money so paid on said notes. Said deed was duly recorded on the 28th day of April, 1877, and the title of record remained in said Jacob Smock until March 1st, 1878, when said Smock reconveyed a part of said land, to wit, the real estate now in suit, to the plaintiff, and the remainder thereof, the same being by the parties treated as a payment of said sums which said Smock had paid for the plaintiff, he conveyed to his son, Jacob F. Smock, and the third note secured by said mortgage was on the same day taken up, and said Jacob F. and the plaintiff made their note instead and executed a mortgage to secure the same on the whole of said tract of land which the plaintiff had owned. The plaintiff did not surrender possession upon the execution of his said deed to said Jacob Smock, but continued in the actual occupation of the whole of the land until March 1st, 1878, when said Jacob F. took possession of the portion conveyed to him, and has remained in possession thereof, and the plaintiff has continued to occupy the land in suit, so reconveyed to him. While Jacob Smock held the legal title under said deed from the plaintiff, to wit, on the 2d day of August, 1877, one Eliza R. Scott (since Espy) caused to be filed in the office of the clerk of the circuit court of Johnson county a duly certified transcript of a judgment which she had recovered in the Superior Court of Marion county against said Jacob Smock and others in the sum of \$3,100, which thereby became an apparent lien on said land, and thereafter she caused an execution to issue on said judgment from said court, directed to the sheriff of Johnson county, who levied the same on said real estate, and on the 4th day of October, 1877, returned said writ unsatisfied, but with the levy indorsed thereon as a part of the return. Afterward, and after the date of said reconveyance to the plaintiff, to wit, on June 10th, 1879, said Eliza Espy duly assigned of record her said judgment to the appellees, who took the same, paying the full amount thereof, in ignorance and without

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notice of the fact that said deed from the plaintiff to said Smock was only a security, or that the plaintiff claimed it to be such, and in the belief that said judgment was a lien on the land from the date of the filing of said transcript.

On these facts, the appellant claims that Jacob Smock had no interest in the land on which the judgment became a lien, which the judgment plaintiff could enforce in preference to the rights of the plaintiff, and that the appellees, by virtue of their purchase of the judgment, acquired no better right or lien than their assignor had; and that if the latter proposition can not be maintained, still the plaintiff's continued possession was notice of his rights which precluded the claim of the appellees that they purchased in good faith. As bearing on these, the counsel on either side have advanced in discussion a number of minor propositions, which need not be mentioned now, but, if necessary, will be considered in their proper connection as we proceed.

The doctrine is well settled that a deed of realty, though absolute on its face, will be treated in equity as a mortgage only, if the purpose of its execution was to secure the payment or discharge of an existing debt or liability. It is clear, therefore, that as between Tuttle and Smock, and as to all who had notice of the facts, the deed of April 26th, 1877, was only a mortgage.

It must be conceded, too, as a general proposition, that the possession of real estate is constructive notice to all the world of the rights of the party in possession. There are, however, recognized exceptions to the rule. In *Work v. Brayton*, 5 Ind. 396, citing 3 Sandf. Ch. (N. Y.) 176, *Scott v. Gallagher*, 14 S. & R. 333, *Woods v. Farmere*, 7 Watts, 382, and *Newhall v. Pierce*, 5 Pick. 450, it was held that the possession of the vendor, who remained in possession after conveying, was not notice of his right to a vendor's lien. It was there said that, having remained in possession without any contract, so far as appeared, authorizing him to do so,

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he was a mere tenant at sufferance, with the title of such a tenant and no other ; and that the authorities seem sufficiently conclusive on the proposition, that, "where the deed of the grantor has been put upon record, acknowledging the receipt of the purchase-money, he will be estopped from relying on his continuance in possession as notice of a lien for purchase-money, as subsequent purchasers are not bound to go beyond the recorded declarations of the parties and inquire into their actual relations."

The 17th section of an "Act concerning real property and the alienation thereof," approved May 6th, 1852, 1 R. S. 1876, p. 365, is as follows: "When a deed purports to contain an absolute conveyance of any estate in lands, but is made, or intended to be made, defeasible by force of a deed of defeasance, bond, or other instrument for that purpose, the original conveyance shall not thereby be defeated or affected as against any person other than the maker of the defeasance, or his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law, within ninety days after the date of said deed."

In *Crassen v. Swoveland*, 22 Ind. 427, after quoting this section of the statute, the court says: "This statute, it will be seen, requires actual notice, to defeat a purchaser, where the defeasance has not been duly recorded. Possession has never been held anything more than constructive notice. Such constructive notice does not come within the statute. This is in accordance with the authorities. Says an elementary writer: 'Nor will the continued possession by the grantor of land, after the making of his deed, be notice of a defeasance held by him, which is not recorded.' 1 Wash. Real Prop., p. 495, sec. 22. The case of *Hennessey v. Andrews*, 6 Cush. 170, is directly in point, under a statute similar to our own."

It is claimed that there is conflict in this respect between these cases and the case of *Glidewell v. Spaugh*, 26 Ind.

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319. There the vendor did not remain in possession, nor the vendee take it, but immediately upon the execution of the conveyance a third party, Glidewell, who claimed that the grantee held only in trust for him, took and held the possession; and it was held that "the fact that immediately upon the conveyance of the property to Wœhler, the appellant entered into possession of the same, and continued to hold that possession at the date of the sheriff's sale, was constructive notice to the appellee of Glidewell's rights and put him upon inquiry," etc. The cases are plainly distinguishable, and not at all at variance upon the doctrine under consideration. There is, however, conflict of authority on the subject. See 2 Lead. Cas. in Eq., p. 184, and the case of *Pell v. McElroy*, 36 Cal. 268, which is pressed upon our attention as unanswerably establishing a contrary doctrine to the one stated, *supra*. We do not deem it necessary or profitable to examine the reasoning of the court in that case, or to enter into a review and citation of the cases pro and con, but content ourselves with saying that the doctrine already substantially, if not directly, decided by this court in the cases cited, meets our approval, and is more in harmony than the contrary view, with the legislative policy of the State on the subject, as manifested in the section of the statute concerning conveyances which has been quoted.

It may be true, as counsel for the appellant contend, and as declared in the opinion of one of the judges of the superior court, that the subject is not controlled by said 17th section of the statute, because "It provides only that when a deed purports to be an absolute conveyance, it shall not be defeated or affected by force of a *deed*, *bond*, or other *instrument*, unless the same shall have been recorded, etc. Here the plaintiff does not set up or rely on a written evidence of the interest he asserts. His right rests in parol and can be proven only, as the whole case assumes, by oral testimony that the deed to Smock was in fact intended by

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the parties as a mortgage. He had the legal right to rest on the oral promise to reconvey. No statute required the transaction to be evidenced by a writing. Not being required to take a writing, the plaintiff can not be charged with negligence in not placing a defeasance on record. The question of registry does not apply to the facts of the case; and the statute quoted can have no application, inasmuch as it does not inhibit the taking of a parol defeasance or provide that such a defeasance shall not affect the deed, but simply requires the registration of instruments in writing which are to so operate. The reports are full of cases where the agreement to reconvey has been shown by parol, and in no case, within my knowledge, has this section of the statute been arrayed against such proof, and the case in the 22 Ind., *supra*, does not so hold or intimate. An unrecorded written defeasance was there involved, and what was said as to the application of the statute had reference to that fact."

What is here said in reference to the admissibility of the proof of the defeasance, is aside from the question, because the proof is always admissible, whether parol or in writing, and whether the writing be recorded or unrecorded. The statute does not exclude the evidence in any case, but only limits its effect to "the maker of the defeasance, his heirs or devisees, or persons having actual notice thereof, unless the instrument of defeasance shall have been recorded, according to law." But if we adopt the doctrine of constructive notice, by reason of the continued possession of the grantor, after the making of his deed, as applicable to cases wherein the defeasance is provable by parol evidence only, we arrive at the singular and anomalous conclusion, that the grantor of land who takes back written evidence of his reserved right is in a worse position than one who reserves the same right, but takes no written evidence thereof. The latter could enforce his right against all the world on the ground of constructive notice inferred from his continued possession; while

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the former, who has maintained a like possession, and has better and indisputable proof of his right, can assert and enforce it only against such as he can prove to have had actual notice thereof. His instrument of defeasance, too, by reason of not having been acknowledged, or having been improperly acknowledged, may have been as incapable of registration as though it had been a parol defeasance only. We can not consent to adopt a doctrine which would place the careful man in a worse plight than the less careful one; and we therefore hold that the fact that Tuttle remained in possession of his land after conveying it away by a deed absolute on its face, under the circumstances stated as proven, was not constructive notice to the appellees of his right to have his said deed treated as a mortgage.

Whether Mrs. Espy, by filing a transcript of her judgment in the office of the clerk of Johnson county, and by causing an execution to be issued and levied, acquired a lien on the land, which she could have enforced in preference to the rights of the plaintiff, we need not, and do not, decide; but the appellees, having purchased the judgment which by the records appeared to have become a lien on the land, and having expended their money upon the faith of that appearance, did acquire such superior right, and were entitled on the evidence to a finding and judgment in their favor. Upon this phase of the case there is no serious dispute, resting, as it does, upon the authority of the following cases: *Flanders v. O'Brien*, 46 Ind. 284; *Busenbarke v. Ramey*, 53 Ind. 499; *Wainwright v. Flanders*, 64 Ind. 306.

The judgment of the superior court at general term, reversing that at the special term, is affirmed, with costs.

Opinion filed at November Term, 1880.

Petition for a rehearing overruled at May Term, 1881.

Fee et al. v. Moore et al.

No. 7654.

FEE ET AL. v. MOORE ET AL.

74	319
137	247

ATTACHMENT.—Mortgage.—Notice of Pending Suit.—Where a creditor takes a mortgage upon land which had been levied on in attachment proceedings by other creditors, and which was in the custody of the court, he is chargeable with notice of the litigation pending in relation to such property.

SAME.—Jurisdictional Fact.—Judgment.—Collateral Attack.—The question as to whether claims had been filed under an original attachment proceeding, and had become a part thereof, is a jurisdictional question necessary for the court to determine before it could act, and its determination of that question, and its judgments rendered on such claims, where the court is one of general jurisdiction, can not be collaterally questioned.

SAME.—Lien of Attaching Creditor and Parties Filing Under his Proceedings.—Creditors filing under an attachment proceeding acquire all the rights and liens of the attaching creditor, and are entitled, jointly with him, to a *pro rata* distribution of the proceeds of the attached property.

SAME.—Lien on Property Attached.—Debtor can not Encumber Property in Custody of Court.—The order of attachment, in attachment proceedings under the statute, binds the property of the defendant in the county, and creates a lien thereon from the time it comes into the hands of the sheriff; and the seizure of such property by the sheriff places it in the custody of the court, and thereby prevents such defendant from disposing of the same or creating any incumbrance or lien thereon, until not only the attaching creditor has been paid, but all others filing under the attachment proceedings, and becoming parties thereto, have been fully paid, should there be sufficient property.

SAME.—Lien of Parties Filing Under Attaching Creditor.—Lien of Mortgagee.—The lien of a creditor filing under an original attachment proceeding against real estate, commenced prior to the execution of a mortgage thereon, by the attachment defendant, is prior and paramount to the lien acquired by the mortgagee upon such real estate, although the date of the filing of such creditor's claim is subsequent to the execution of the mortgage.

From the Steuben Circuit Court.

J. I. Best, C. A. O. McClellan and R. W. McBride, for appellants.

J. A. Woodhull and W. G. Croxton, for appellees.

FRANKLIN, C.—Moore and Welch, at the February term, 1878, of the court below, commenced a suit against one Hull

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and wife on a note executed by Hull and a mortgage executed by Hull and wife to secure the payment of the note, both dated October 26th, 1876, making appellants Fee and Brown co-defendants therein, alleging that they were junior incumbrancers, and claimed to have a lien upon the mortgaged property. Hull and wife were defaulted.

Appellants answered separately, but similar matters, in defence; each filed a general denial and cross complaint, alleging, in substance, that before the execution of the mortgage one William H. Reed had brought a suit in the Steuben Circuit Court against said Hull, and had caused an attachment to issue therein, by which said mortgaged land was attached on the 20th day of July, 1876; that on the 23d day of October, 1876, and while said attachment proceeding was still pending, the appellant Fee, as alleged in his cross complaint, filed his complaint, affidavit and written undertaking in said cause against said Hull, and became a party to said proceeding, and afterwards, to wit, on the 4th day of May, 1877, recovered a judgment thereon against said Hull, and a finding of said court that said judgment was a part of the proceedings in said Reed attachment case, with an order to pro-rate with said Reed, and other creditors who had become parties thereto, in the money realized from the sale of said land. And appellant Brown alleges, in his cross complaint, that on the 14th day of December, 1876, and while said Reed attachment proceeding was still pending, he filed his complaint, affidavit and undertaking in said cause against said Hull, and became a party thereto; and afterwards, on the 4th day of May, 1877, he recovered a judgment in said proceeding against said Hull, and a finding of said court that said judgment was a part of the proceedings in said Reed attachment case, with an order to pro-rate with said Reed, and other creditors who had become parties thereto, in the money realized from the sale of said land.

Appellees denied these cross complaints, and issues were

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thus formed. The cause was submitted to the court, which found for the appellees against the mortgagors and these appellants. Each appellant moved for a new trial, which was overruled, and to which each excepted. The court thereupon rendered a judgment of foreclosure against all of the defendants. The appellants each have assigned as error the action of the court in overruling the motion of each of them for a new trial.

The question presented for decision in this case is the priority of liens. We have carefully examined the record with the bill of exceptions containing the evidence, and make the following summary of the facts: The note and mortgage sued upon were dated October 26th, 1876; the note was executed by Hull, and the mortgage by Hull and wife, to E. H. Moore. The mortgage was in the form of a deed, to become void on payment, and did not contain any independent promise to pay. The note contained no assignment indorsed thereon. The mortgage had the following indorsement thereon, to wit: "I hereby assign the within mortgage, and the note therein secured, to Moore & Welch. E. H. Moore." That Reed commenced an action in attachment against Hull on the 20th day of July, 1876, and on that day the land embraced in the mortgage was attached. This attachment proceeding was pending until the 15th day of December, 1876, when judgment was rendered in favor of Reed against Hull, in said proceeding, and the land attached ordered to be sold. The record is silent as to whether there has been any sale or offer for sale of the lands in controversy, under this original attachment proceeding, or either of said proceedings. That on the 23d day of October, 1876, appellant Fee, filed in said court his complaint, affidavit and written undertaking against said Hull, and obtained judgment thereon against said Hull, on the 4th day of May, 1877; that his said claim was then adjudged to have been filed

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under the attachment proceedings of said Reed, and it was ordered that a *pro rata* share of the money realized from the sale of said land be paid to him; that on the 14th day of December, 1876, the appellant Brown filed his complaint, affidavit and written undertaking in said court against said Hull, and on the 4th day of May, 1877, recovered judgment thereon against said Hull; that his said claim was then adjudged to have been filed under the attachment proceeding of said Reed, and it was ordered that a *pro rata* share of the money realized from the sale of the land should be paid to him. Recapitulation:

Reed attached the land July 20th, 1876;

Fee filed his complaint, etc., October 23d, 1876;

The mortgage was executed October 26th, 1876;

Brown filed his complaint, etc., December 14th, 1876;

Reed obtained judgment December 15th, 1876;

Fee obtained judgment May 4th, 1877,

Brown obtained judgment May 4th, 1877.

Thus the priority of liens is presented, and in order to determine this question it is necessary, first, to inquire whether the claims of appellants were filed and prosecuted under the attachment proceedings of Reed, then pending.

The record evidence of the filing of the papers, with the indorsements thereon, and the docketing of the claims, and also the parol evidence, all of which is contained in the bill of exceptions, show very clearly that appellants intended to and did file their complaint, affidavit and written undertaking under the attachment proceeding of said Reed, then pending in said court, and that their claims were prosecuted to final judgment under said attachment proceeding; and that the court below, in finally determining said attachment proceedings, did right to adjudge that appellants' claims were filed under, and prosecuted to judgment under, and as a part of, the original attachment proceedings of said *Reed v. Hull*.

Counsel have discussed the question as to whether these

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are judgments *in rem*. It is very difficult, in some cases, to determine accurately what is a judgment *in rem*. The short definition of the technical phrase, *in rem*, that is sometimes given, that it is in a proceeding against a thing, by which every person is bound, still leaves the troublesome question to be decided, by what kinds of proceedings are all persons bound? We are aware that the authorities have placed a more limited meaning upon the phrase than the mere literal meaning of the words. Drake on Attachments, sec. 5, says that attachment proceedings are in the nature of, but not strictly, proceedings *in rem*. Bigelow on Estoppels, p. 148, says that although proceedings in attachment are not strictly proceedings *in rem*, yet they are sometimes mentioned as such; and an order of sale of perishable goods, levied on by an attachment, operates as a proceeding *in rem*, binding, as it does, all persons. We are unable to see why the sale of perishable goods is any more *in rem* than the sale of those that are not perishable; they are both alike, when levied upon, in the custody of the court, and subject to its control. Freeman on Judgments, sec. 606, in discussing that part of the definition sometimes given, that in order to make it a judgment *in rem*, the *status* of the thing must be determined, says: "A judgment against * a tract of land * for a sum of money, to be satisfied by execution against such * land, * though clearly *in rem*, no more determines a *status* than though the defendant were a person." Then why is not a judgment ordering specific property to be sold to pay a sum of money as much a judgment *in rem*?

In the case of *Truitt v. Truitt*, 38 Ind. 16, this court decided that a proceeding to enforce a vendor's lien, and the sale of the property for the payment of a sum of money found to be due, was a proceeding *in rem*.

We have been referred to the 169th section of the code, upon the proposition that no person is bound by the attachment proceeding except those who have notice. This pro-

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vision of the code only refers to proceedings before a justice of the peace. *Matlock v. Strange*, 8 Ind. 57; *Griffin v. Malony*, 13 Ind. 402; *Davis v. Warfield*, 38 Ind. 461.

Whether the judgments in the attachment proceedings are to be regarded *in rem* or not, it seems to us that appellee, in this case, ought to be bound by the proceedings. Here, the land upon which he took his mortgage had been levied upon, and was in the custody of the court, for more than three months before he took his mortgage, and appellant Fee's claim had been filed three days before appellee took his mortgage. He ought to be chargeable with notice of the litigation pending, at the date of his mortgage, in relation to the property mortgaged, and of all the rights that could legally grow out of said pending litigation. And, if he preferred to take his mortgage, instead of filing his claim under Reed's attachment proceedings, it was for him to bear the consequences.

But, even if the attachment judgments are to be considered *in personam*, then they could only be attacked collaterally for fraud or want of jurisdiction. *Taylor v. Elliott*, 51 Ind. 375, and the petition for a rehearing, p. 381, with authorities therein cited.

These judgments have not been attacked for fraud, but it is alleged that the court had no jurisdiction to render them after the original Reed attachment had been disposed of. That depended upon the facts as to whether they had been filed under the Reed attachment case, and had become a part thereof. This being a jurisdictional question, and necessary for the court to determine before it could act, and it being a court of general and superior jurisdiction, its determination of that question is final, and can not be questioned collaterally. *Dequindre v. Williams*, 31 Ind. 444; *Ney v. Swinney*, 36 Ind. 454; *Hackleman v. Harrison*, 50 Ind. 156.

Persons filing under an attachment proceeding acquire all the rights and liens of the attaching creditor, and are enti-

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tled, jointly with him, to a *pro rata* distribution of the proceeds. Even the dismissal of the original attachment proceeding, on account of defective papers, does not discharge the acquired lien of subsequently filed claims thereunder. See the case of *Taylor v. Elliott, supra*. And, if this be true under a defective original proceeding that has been dismissed on account of the defect, for a much stronger reason is it true where the original proceeding is valid, and has been favorably prosecuted to final judgment. The reasons for this rule will more fully appear by an examination of the provisions of our statute.

Section 161 of the code reads as follows: "Upon the filing of such affidavit and written undertaking in the office of the clerk, he shall issue an order of attachment, which shall be directed and delivered to the sheriff. It shall require him to seize and take into his possession the property of the defendant in his county not exempt from execution."

Section 165 reads: "An order of attachment binds the defendant's property in the county subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff, in the same manner as an execution."

Section 186 provides, among other things, that "Any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against the defendant," etc.

Section 187 reads: "A dismissal of his action or proceedings in attachment by the first attaching creditor, shall not operate as a dismissal of the action or proceedings of any subsequent attaching creditor."

Section 192 reads: "The money realized from the attachment and the garnishees shall, under the direction of the court, after paying all costs and expenses, be paid to the

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several creditors, in proportion to the amount of their several claims as adjusted, and the surplus, if any, shall be paid to the defendant.”

According to these provisions, the order of attachment binds the property of the defendant in the county, and creates a lien thereon, from the time it comes into the hands of the sheriff, and requires him to seize an ample amount to pay the attaching creditor's claim; and thus the property of the defendant, in the county, is placed in the custody of the court, through the sheriff, and made subject to the order of the court. And the attachment defendant can make no disposition of nor create any incumbrance or lien thereon, until not only the attachment creditor has been paid, but he, with all subsequent attaching creditors filing thereunder and becoming parties thereto, have also been fully paid, should there be sufficient property of the defendant to pay the same. And whatever is realized from the attachment proceedings is required to be divided, *pro rata*, among all the attaching creditors, each getting his full share. And any creditor refusing, neglecting or failing to file thereunder, can not acquire, after the order of attachment comes into the hands of the sheriff, any prior lien; and if he omits to file under and become a party to the attachment proceedings, he has no right to complain, even if he fails to get a *pro rata* share of the property attached, or the proceeds thereof.

Appellants, by their attachment proceedings, acquired a lien upon the attached property, of the date of the original attachment writ coming into the hands of the sheriff, in the Reed proceeding, to wit, July 20th, 1876; and the same is prior and paramount to appellees' mortgage lien.

The court below erred in giving appellees' mortgage lien priority to, and a preference over, appellants' attachment liens; for which the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing

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opinion, that the judgment below be, and it is hereby, in all things, reversed, at the costs of appellees, and that the cause be remanded to the court below for further proceedings, in accordance with this opinion.

No. 7366.

PEACOCKE v. LEFFLER.

DECEDENTS' ESTATES.—*Final Settlement.*—*Collateral Attack.*—The final settlement of a guardian or administrator can be set aside or opened up only by a direct proceeding for that purpose. It can not be attacked by a suit on the bond or by a suit against the guardian or administrator personally or in any other collateral manner.

SAME.—*Legatee.*—*Action for Money Advanced to Executor to Make Settlement.*—*Fraud.*—*Complaint.*—Where, in an action by the sole legatee of an estate against the executor thereof, after his final settlement, to recover money advanced to such executor, to enable him to make a speedy settlement of the estate, the complaint avers that the executor charged himself with the sum so obtained, and applied it in the settlement of the estate, the additional averment therein that he procured such money from the legatee by false representations, is insufficient to show actionable fraud on the part of such executor.

From the Monroe Circuit Court.

J. W. Buskirk, H. C. Duncan and S. Peacocke, for appellant.

W. N. Tracewell and R. J. Tracewell, for appellee.

WOODS, J.—The appellant, the plaintiff below, has assigned error upon the overruling of her motion for a new trial. The causes alleged in support of the motion were, that the verdict is contrary to law and not supported by sufficient evidence, and error of the court in admitting and excluding evidence, and in instructing the jury.

The complaint is in three paragraphs, and is needlessly

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prolix. The first paragraph, covering twenty-one pages of the transcript, contains substantially the following alleged facts: That Samuel H. Keene died testate, devising his whole estate to the plaintiff, and naming the defendant as the executor of his will. The defendant qualified as executor, March 31st, 1864, and made final settlement of his trust and was discharged therefrom by order of the court, April 27th, 1866. That, at the request of the defendant, and on his representation that it was necessary, in order to make an early settlement of said estate, she advanced to the executor of her own separate means, not derived from said estate, the sum of \$464.56, which the defendant charged against himself on his supplementary inventory and applied to the uses of said estate; but she charges, that his representation that the money was necessary was false, that other moneys of said estate came to his hands enough to pay all proper liabilities, which moneys he did not charge himself with, but converted the same to his own use or applied them to the payment of improper and unlawful claims. That, after he had made final settlement and had been discharged from said trust, the defendant represented that the assets in his hands and moneys received of her had not been sufficient, and that he had been compelled to use, and had used, of his own means, in discharge of the liabilities of said estate, large sums, to wit: at one time \$272, and at another time \$270. That, believing his representations, she repaid him said sums, to wit: \$270 on the first day of November, 1876, and on the 22d day of February, 1869, \$272.12. That said representations were false.

. The second paragraph charges that, while executor of said estate, the defendant procured the plaintiff to allow him the sum of \$150, for moneys he claimed to have loaned to said Keene in his lifetime; that, on the 18th day of November, 1865, the defendant made his promissory note to the plaintiff for \$265.40, payable one year from date, and, after said

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note was due, by falsely representing that said sum of \$150 was due him and had never been paid, procured her to give him credit therefor on said note; that, in truth, said sum was not owing or due him, but he had collected the same from said estate, and had concealed the knowledge of the fact from the plaintiff; that, after said note was due, the defendant falsely represented that she was indebted to him in the further sum of \$64.83, and, relying on his said representation, and having no knowledge of the facts on which the claim was based, she allowed him a credit for said sum on said note. That, on the 22d day of February, 1869, the defendant made of her a further demand for moneys expended by him in making said settlement of April 27th, 1866, and falsely represented that he had expended his own moneys in making said settlement, to the amount of \$272, which had not been repaid him; and relying on said representation as true, and in ignorance of all the facts concerning said Keene's estate, she consented that the remainder due on said note, viz., \$60, should be set off against said sum of \$272 claimed by the defendant and said note surrendered, which was accordingly done; that no part of said note has been paid, and said credits, to wit, \$150, \$64.83 and \$60, were procured by the fraud and imposition of the defendant, as already set forth.

The third paragraph is a common count for money had and received, to wit: April 24, 1866, \$464.56; April 25, 1866, \$170.09; April 27, 1866, \$150.00; November 1, 1866, \$270.00; November 18, 1866, \$265 40; February 22, 1869, \$272.12.

The final settlement of a guardian or administrator can be set aside or opened up only by a direct proceeding for that purpose. It can not be attacked by a suit on the bond of the guardian or administrator, or by a suit against such guardian or administrator personally, or in any other col-

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lateral manner. *Barnes v. Bartlett*, 47 Ind. 98 ; *Holland v. The State, ex rel.*, 48 Ind. 391.

The complaint in this case is therefore bad, in so far as the plaintiff seeks to charge the defendant with any misconduct as executor of said estate ; as, for failure to account, or for misapplication of the money or property which came into his hands, or for any other breach of duty. The averment that, by false representation, he procured the plaintiff to advance the sum of \$464.56, to enable him to make a speedy settlement of the estate, shows no actionable fraud for this reason, namely : The complaint shows that the defendant charged himself with the sum so obtained on his supplemental inventory, and applied the same to the uses of said estate, which was equivalent to an application for the use of the plaintiff, she being the sole legatee and owning the whole estate. No actionable wrong was accomplished in reference to that money ; and for any misappropriation of other moneys of the estate, the settlement and discharge are a bar to any suit. If, therefore, the plaintiff is entitled to any relief on her complaint, it must be by reason of what occurred after said settlement.

The first paragraph charges that by means of a false representation, that he had been compelled to use his own means in making the settlement, the defendant procured of the plaintiff, after the settlement had been made, large sums of money in repayment of the sums expended by the defendant ; and the second paragraph charges that by a like false representation he obtained said credits on said note, and a surrender of the note itself.

On examination of the record which purports to contain all the evidence adduced on the trial, we find no evidence that the defendant obtained any money of the plaintiff except such as she paid him as executor, to enable him to make said settlement. There could, therefore, have been no recovery either on the first paragraph or on the third.

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There was evidence that credits were made on the note at or near the times and for the amounts charged, but no evidence to warrant a conclusion that they were obtained by the false representations charged, nor to show that such representations were made. The final report of the defendant as executor, on which the court declared his trust settled, showed a balance of \$272.00 in the defendant's favor, and it was, as already shown, in partial repayment of this sum that the plaintiff made the final credit of \$60.00 on her note against the defendant, but this balance, shown and declared in his favor in the record of the final settlement of his trust, did not constitute, or tend to show, any of the representations charged against the defendant, and it does not appear by any testimony that the credits on said note, or any of them, were obtained by means of such representations, or that the defendant made the representations charged to have been made after said settlement, for the purpose of obtaining such credits.

The evidence which was admitted over plaintiff's objection, and that offered by him which the court excluded, could have had no bearing upon this part of the case, but only in the direction of the effort to charge the defendant for misuse or conversion of moneys which he held as executor, and while exercising his office as such. But the settlement barred inquiry in that direction. The same may be said of the instructions complained of. Whether, therefore, the court erred in any of the particulars charged, it is immaterial to inquire.

In the language of the 580th section of the code, it "appear[s] to the court that the merits of the cause have been fairly tried and determined in the court below," and the judgment should not be reversed for any cause which has been brought to our attention.

Judgment affirmed, with costs.

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ON PETITION FOR A REHEARING.

WOODS, J.—The appellant claims that “An executor or administrator has the right to proceed and complete the settlement of a decedent’s estate with the moneys of the decedent. He is charged with the duty to administer the assets of the decedent, pay debts out of such assets, and to pay over to the distributees the balance;” and that, according to *Rodman v. Rodman*, 54 Ind. 444, “When property or money, which does not belong to the estate of a decedent, may come into the possession of a party who happens to be the administrator of such estate, such party can not, by charging himself, as such administrator, with such property or money, make such property or money a part of the assets of his decedent’s estate, nor can he, by so doing, render the estate of his decedent, or himself as administrator, liable for such property or money to the lawful owner thereof.” And upon this authority and others cited, which are claimed to tend in the same direction, counsel insist that the record of the final settlement was no bar to the plaintiff’s action to recover the money which she advanced to the defendant from her private purse to enable him to make that settlement. We do not dispute the authorities cited, and there is nothing inconsistent therewith in the principal opinion. We held, and still hold, that the complaint shows no cause of action to recover the money so advanced, or damages on account thereof, because the complaint shows that the defendant appropriated said moneys for the plaintiff’s sole use, and that the only cause of action really set forth is for the assets of the estate which the defendant had misappropriated, or not accounted for, and against such claim the final settlement is a clear bar.

The petition is overruled, with costs.

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No. 7243.

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194	560
74	333
141	51
74	333
151	193

REAL ESTATE.—Decedents' Estates.—Descents.—Widow's Interest.—Vendor's Lien Paramount.—If a purchaser of real estate die the absolute owner of a title bond thereto, the lien of the vendor for the purchase-money due him is paramount to the claim of his widow.

SAME.—Surety.—Assignment of Title Bond.—Indemnity.—Subrogation.—Where a title bond has been assigned to indemnify a surety, with agreement to reassign, and the surety has, after the death of the vendee, assumed the payment of the notes for purchase-money, as well as the notes on which he was surety, and the administrator has surrendered his agreement to reassign the title bond, the surety is subrogated to the rights of the vendor, and may hold the bond, or the land if he has received a deed, until the debts for which the bond was pledged to him are paid.

SAME.—Widow's Remedy.—Accounting.—In such case, the surety holds the bond, or the land, as a security, and the widow's remedy is to have an accounting, and to redeem the premises when the amount due the surety is ascertained.

SAME.—Part Payment of Consideration.—Under section 30 of the statute of descents, the lien of a vendor for purchase-money of land yields in part to the claim of the widow of the vendee, and if the husband has paid part of the consideration, and the real estate is sold under any decree, or by virtue of any power or devise in his will, she is entitled to her third of such land, in proportion to the amount paid thereon.

From the Jennings Circuit Court.

D. Overmyer, for appellant.

J. D. New and *W. Dixon*, for appellee.

NEWCOMB, C.—The appellant was the plaintiff below. Her complaint was for a partition of real estate, of which she alleged the appellee was in possession, claiming the exclusive title. The facts stated are, that the plaintiff is the widow of Samuel R. Keith, deceased; that, during his lifetime, one Milley Fish executed to him a title bond for the land in question, conditioned for a conveyance in fee simple on the payment of the purchase-money; that the decedent paid more than one-third of the purchase-money, and gave his notes for the residue; that afterward said Samuel assigned the title bond to the defendant Hudson, to indemnify him as surety

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upon certain promissory notes of said Samuel, and Hudson executed a writing by which he agreed to reassign said bond to his assignor, if the latter should punctually pay the notes on which Hudson was such surety. Keith died, leaving said notes unpaid, as well as the notes for the purchase-money of the land. An arrangement was subsequently made between Keith's administrator and Hudson, with the assent of Keith's creditors, by which Hudson assumed the payment of said notes on which he was surety and gave his own note to Milley Fish for the balance of purchase-money due on the land, and the administrator surrendered the agreement by which Hudson had obligated himself to reassign the title bond to Keith. Pursuant to this arrangement, Hudson procured and surrendered to the administrator the notes held by Milley Fish, and also the notes on which he was surety. It is further alleged that the property was worth \$1,600, and that the sum of the debts so assumed by Hudson did not exceed \$900. Judgment was rendered against the appellant, on a demurrer to her complaint.

It is claimed by the appellant, that she is entitled to one-third of the land in question, either under section 27 or section 29 of the statute of descents. These sections are as follows :

“Sec. 27. A surviving wife is entitled, except as in section seventeen excepted, to one-third of all the real estate of which her husband may have been seized in fee simple, at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law ; and also of all lands in which her husband had an equitable interest at the time of his death.

“Sec. 29. If the husband shall have made a contract for lands, and, at the time of his decease, the consideration in whole or in part shall not have been paid, but after his death the same shall be paid out of the proceeds of his estate ; his

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widow shall have one-third of said lands in the same manner as if the legal estate had vested in the husband during the coverture."

If Samuel R. Keith had any equitable interest in the real estate in controversy, at the time of his death, it was subject to the burden of the notes on which Hudson was surety, and to the unpaid purchase-money. Had Keith died the absolute owner of the title bond, the lien of the vendor for the purchase-money due was paramount to the claim of his widow. *McMahan v. Kimball*, 3 Blackf. 1; *Fisher v. Johnson*, 5 Ind. 492; *Talbott v. Armstrong*, 14 Ind. 254; *Patton v. Stewart*, 19 Ind. 233; *Crane v. Palmer*, 8 Blackf. 120; *Alexander v. Herbert*, 60 Ind. 184.

Unless the arrangement made between Hudson and the administrator is to be regarded as a payment of the balance of the purchase-money from the proceeds of the estate of Samuel R. Keith, such purchase-money is still owing to Milley Fish; or, if it has been paid by Hudson, it is owing to him, and he is subrogated to the rights of the vendor. That the parties did not regard the transaction as a payment of the purchase-money by the administrator, so as to re-vest the title bond in the estate of Keith, is evident from the fact that the agreement of Hudson to reassign the title bond was surrendered, leaving the assignment to him absolute.

Whether the administrator had lawful authority to make this contract with Hudson we need not inquire, as no objection is made to it by the appellant. On the contrary, she claims a supposed benefit from the act of the administrator, and, so far as she is concerned, affirms it. If the appellant seeks to profit by the arrangement between the administrator and Hudson, it would be manifestly inequitable to cast all its burdens upon the latter. He was entitled to hold the title bond until the notes on which he was surety were paid; and, if compelled to pay them himself, he was entitled to be reimbursed from the proceeds of the bond or of the land.

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So, if to make the bond available to him as a security, it became necessary for him to pay the balance of the purchase-money, the lien of the vendor would pass to him by subrogation. Besides this security, he would have had a claim against the estate of Keith for whatever sum he might have to pay as surety on the notes. By the contract with the administrator, the estate was relieved of this liability, and of the indebtedness to Milley Fish, and Hudson was released from his obligation to reassign the title bond. If the appellant affirms this transaction, she must affirm it in its entirety. On the other hand, if she repudiates it, and the administrator exceeded his authority in making it, the case stands as though it had not been made, and Hudson is entitled to hold the bond, or the land if he has received a deed, until the debts for which the bond was pledged to him are paid. In that case he holds the bond or the land as a security, and the widow's remedy is to have an accounting, and to redeem the premises when the amount due to Hudson is ascertained.

There is one contingency in which the lien of a vendor for purchase-money yields in part to the claim of the widow of the vendee. Section 30 of the statute of descents provides that "If the husband shall have made a contract, subsisting at the time of his death, for real estate and paid only part of the consideration, and said real estate shall be sold after his death under any decree, or by virtue of any power or devise in the will of the husband, the widow shall be entitled to her third of such real estate, in proportion to the amount paid under said contract by the said husband."

Under this section it was held in *Carver v. Grove*, 68 Ind. 371, that when a deceased husband had paid one-third of the price of a tract of land, and his administrator afterward sold said land under an order of the proper court, to raise means to pay the residue of the purchase-money, the widow was entitled to one-ninth of the land as against the purchaser at the administrator's sale. But it does not appear in the

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case in hand that the administrator acted under any power or devise, or that Samuel R. Keith left a will, nor does it appear that there was any decree or order of court authorizing or directing the transaction had between the administrator and the appellee. Section 30 is, therefore, inapplicable to the case.

We find no error in the action of the circuit court, and its judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things, affirmed, at the costs of the appellant.

No. 8934.

NORTON v. THE STATE.

CRIMINAL LAW.—Burglary.—Indictment.—Corporation.—Railroad Company.—Presumption.—Where an indictment for burglary charges that the offence was committed by a burglarious entrance into the office of a railroad company, therein designated, it is not necessary to also aver that such company was a corporation, partnership or stock company. In such case corporate existence will be implied.

SAME.—Evidence.—De Facto Corporation.—It is not error in such case to permit a witness to state that such railroad company was a corporation; it is sufficient to prove that such company was known and acting as a corporation.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

D. P. Baldwin, Attorney General, and *W. H. Trippet*, Prosecuting Attorney, for the State.

ELLIOTT, J.—Appeal from a judgment of conviction of the crime of burglary entered against appellant. It is here

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insisted that the indictment is defective, and should have been quashed on the appellant's motion. The offence is charged to have been committed by a burglarious entrance into the office of the Terre Haute and Evansville Railroad Company. The specific objection urged is that the indictment does not show "whether the Terre Haute and Evansville Railroad Company was a corporation, partnership or stock company." The argument of appellant's counsel is conclusively answered by the case of *Johnson v. The State*, 65 Ind. 204. It was there said: "We think it fairly deducible from the authorities, that, when an ideality is referred to in a pleading by a name such as is usual in creating corporations, and which discloses no individuals, a corporate existence is implied without being specially averred." This we regard as the correct doctrine. No innocent man can ever be put in peril by it, and many guilty ones may, by its operation, be prevented from escaping merited punishment.

The court permitted a witness to state that the Terre Haute and Evansville Railroad Company was a corporation. There was no error in this. It was proper to prove that the railroad company was known and acting as a corporation. Wharton Criminal Evidence, sec. 164a. This conclusion is the logical sequence of the doctrine declared in *Smith v. The State*, 28 Ind. 321. It is indeed doubtful, whether it was incumbent upon the State to do more than prove that there was an artificial being assuming and acting under a name indicating and implying a corporation.

The affidavits presented in support of appellant's claim for a new trial, upon the ground of newly-discovered evidence, are not such as entitle him to a new trial. It would serve no useful purpose to examine these affidavits in detail.

Counsel say: "We submit that the court should have given the instructions asked by the appellant instead of those given by the court." This ought not to be regarded

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as a sufficient presentation of objections to rulings, but we have nevertheless looked into the instructions given and refused, and find no error.

Judgment affirmed, at costs of appellant.

No. 7490.

PHELPS v. MARTIN.

DECEDENTS' ESTATES.—Attachment of Administrator.—Practice.—Pleading.

—A right to a trial by jury, "in all cases where there is an issue of fact," under section 188, 2 R. S. 1876, p. 556, implies the right in an administrator to put a case against him, under section 22 or section 161 of the act concerning the settlement of decedents' estates, in shape for trial by special pleas, or by answer in denial, tendering or forming issues of fact to be tried as such.

SAME.—Section 161, 2 R. S. 1876, p. 549, strictly construed, does not apply to the case of one who has been removed from his trust and is no longer an executor or administrator, but may, perhaps, be construed in connection with section 30, 2 R. S. 1876, p. 504.

SAME.—*Answer of Accomplished Wrong.*—An answer, showing that whatever wrong had been done was fully accomplished before the defendant's removal from his trust, that since his removal he has not had the balance due the estate in his possession or control, has not concealed it, and has no power to restore it, nor means with which to secure its restoration, constitutes a good and complete defence against procedure under section 161, 2 R. S. 1876, p. 549.

SAME.—*Intent of the Law.*—The object of the law under consideration was to effect a discovery and restoration, but not to punish for what could not be compensated.

From the Marion Circuit Court.

J. M. Cropsey, F. M. Wright and W. H. Martz, for appellant.

WOODS, J.—The appellant filed in the circuit court the following petition :

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“In the matter of the estate of Allen E. Phelps: Now comes Allen C. Phelps, son and heir of Allen E. Phelps, deceased, and herein complaining of Daniel Martin says: That heretofore, on the — day of February, A. D. 1876, said Daniel Martin was duly and legally appointed in Marion county, Indiana, executor of the estate of said deceased; that, as such executor, he received and collected of moneys belonging to said estate the sum of \$10,183.82; that afterward, on the — day of —, 187—, said Martin was by this court removed from his said trust; that, during the time he was acting as such executor, he laid out and expended on behalf of said estate the sum of \$4,501.21; that, at the time of his removal from said trust, he had in his possession, belonging to said estate, the sum of \$5,682.61; that said Martin has ever since his said removal unlawfully and without right retained and concealed, and yet retains and conceals, from this court and from Thomas Cottrell, administrator *de bonis non* of said estate, the sum of \$5,682.61, money belonging to said estate. Wherefore affiant prays that said Daniel Martin be attached and brought into court, and there examined under oath, touching said money. He further prays that all the property, both real and personal, belonging to said Martin, or in which he has any interest, be attached and held subject to the order of this court, after such examination. He further prays, that in case said Martin refuses to deliver up said money or secure the value thereof to the proper person, together with ten per centum damages thereon, that he may be committed to the county jail until the order of this court be complied with.” This petition was signed and sworn to by the petitioner.

The court issued a writ of attachment against the person of the defendant, which was duly served. The defendant filed two paragraphs of answer, which the appellant moved to strike out, on the ground that an answer was not allowable in the case. This motion was overruled, and, saving an

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exception, the appellant demurred to each paragraph of the answer. This demurrer was overruled to the second paragraph and the exception saved. Issue was joined by a reply in general denial, and, upon a trial by the court, there was a finding and judgment for the defendant, discharging him from custody, and for the recovery of his costs of the appellant.

Counsel for the appellant, in support of their claim that the case is not one which admitted of an answer by the defendant, except on oral examination under oath, cite the case of *Williams v. Tobias*, 37 Ind. 345. But if that case is good law, and in point to show that the defendant had no right to file an answer or special plea, it also shows that the refusal of the court to strike the answers out, if erroneous, was a harmless error. As in that case, so in this, "The answers, demurrers, motions to strike out, and the replies will be regarded as stricken from the record." See, also, *Ex parte Walls*, 73 Ind. 95.

We are not prepared, however, to assent to the proposition, that in this and in like cases, and in proceedings, such as was *Williams v. Tobias*, *supra*, to remove an administrator, under section 22 of the act concerning the settlement of decedents' estates, the defendant may not rightfully by special pleas or by answer in denial, tender or form issues of fact, to be tried as such. That he may, is the natural, if not necessary, inference from section 188 of that act, whereby the right of trial by jury is given "in all cases where there is an issue of fact." There is no express provision to the contrary, and in natural justice it must be permitted, that an administrator may deny any charge brought against him, whether like the one now before us, or made under section 22 of said act, in order to effect his removal, or, if he can admit the charge and plead in avoidance, he may do that. These are the recognized modes of forming issues of fact for trial, and the giving of the right of trial implies the right to put the case in shape for trial. See *McMahan v. Works*, 72 Ind. 19.

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The second paragraph of answer was to the effect that, upon the petition of certain of the sureties upon the defendant's bond as such executor, the court had revoked his letters, and had removed and discharged him from said trust, without ordering or having theretofore ordered him to account for or to pay over any money or property to the court or to any person; that he accounted to his successor in said trust and delivered to him all the property and assets of said estate, except said sum of \$5,682.61, for which, immediately after his appointment as administrator *de bonis non*, said Cottrell brought suit against this defendant and his bondsmen, and on the 20th day of May, 1877, recovered against them a judgment for \$6,463.66, including the statutory penalty, of which sum and judgment \$4,950 have been paid, and execution is in the hands of the sheriff to enforce the payment of the remainder; that, shortly after his appointment as such executor, he collected said sum of \$5,682.61 upon claims due said estate, and being engaged in a business which he supposed to be profitable, and supposing that he owned property of the value of \$20,000 over and above his indebtedness, and would be able to replace said money whenever necessary, and intending so to do, he used the same in his said business; but that, by reason of unforeseen business disasters, and without any concealment or embezzlement, he had lost and was unable to restore said money, and has no money or property with which to satisfy the residue of said judgment.

This prosecution, as the appellant claims, is brought under section 161 of the act concerning the settlement of decedents' estates, which provides:

"Sec. 161. In addition to removing him, if any executor or administrator shall embezzle or conceal any of the property of the decedent, the court shall attach his person and property, and examine him under oath touching such property, and on his refusing to answer in such examination, or to deliver up such property, or secure the value thereof to the

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persons interested in such estate, with ten per centum damages thereon, shall commit him to jail until the order of the court is complied with, or he be discharged according to law.”

Strictly construed, this section does not apply to the case of one who has been removed from his trust, and is no longer an executor or administrator. Perhaps, however, it may be construed in connection with section 30 of the same act, which provides that, “Whenever any executor or administrator is removed, and his letters are superseded, if he at any time afterward unlawfully intermeddles with such estate, he shall be attached and imprisoned, not less than ten days nor more than one month, by the proper court of common pleas, upon complaint of any one interested.”

The petition charges that the defendant “without right retained and concealed, and yet retains and conceals,” said sum of \$5,682.61 belonging to the estate, and this, if true, constituted such an intermeddling after removal, as brought the case within the scope of the section last quoted. The answer, however, is a complete defence, for it shows that whatever wrong had been done was fully accomplished before the removal of the defendant from his trust; that since the removal the defendant had not had the money in his possession or control, had not concealed and had no power to restore it, nor means with which to secure its restoration. While this does not exonerate the defendant and his bondsmen from liability to make good the amount of his defalcation, it does constitute a good defence against this procedure. When an administrator or executor is both delinquent and recalcitrant, refusing to answer questions, or to surrender assets or moneys of the trust, within his control, or to give security within his power to give, for the making good of his delinquency, the court may well exercise its indisputable power to enforce its orders by imprisonment; but this power was not designed to go further, and to be used as a punishment for past offences. The object of the law under con-

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sideration was to effect a discovery and a restoration, but not to punish for what could not be compensated. *Ex parte Wright*, 65 Ind. 504, and cases cited.

The defence set up in this answer was sustained by such evidence as forbids an interference with the finding on the score of want of evidence.

Some exceptions have been saved to rulings of the court in admitting and excluding evidence, but the questions presented are of minor importance, and, whatever view might be taken of them, could not be deemed to have affected the merits of the trial.

The judgment is affirmed, with costs.

No. 8222.

BUNTING ET AL. v. HEILMAN.

PRACTICE.—Promissory Note.—Alteration.—Interest.—Collateral Facts.—Evidence.—Argument.—Where notes in payment for a threshing machine were to be written “with 10 per cent. interest,” and the question before the jury was whether or not the note sued on had been altered after its execution by inserting the figures “10” between “with” and “per cent. interest,” making the note draw ten instead of six per cent. interest, the trial court did not err in holding that an agent’s promise to pay defendants for time lost while waiting for the machine was immaterial, nor in requiring their counsel to refrain from commenting upon it in argument. The rule is that collateral facts should be excluded. The agent’s promise to pay the defendants for lost time was purely collateral to the fact in issue, and was therefore immaterial.

From the Knox Circuit Court.

G. G. Reily, W. C. Johnson and W. C. Niblack, for appellants.

F. W. Viehe and R. G. Evans, for appellee.

Bunting *et al.* v. Hellman.

MORRIS, C.—The appellee sued appellants upon a promissory note for \$625. There were three paragraphs of the complaint, but, as the case was tried upon the first, we need not notice the others.

The appellants answered in three paragraphs: First, the general denial; second, admitting the execution of the note, but averring that it had been altered by the appellee or his agent, by writing the word “ten” therein before the words “per cent. interest,” so that the note called for ten instead of six per cent. interest. The third paragraph was in answer to the third paragraph of the complaint, and alleged payment. The second paragraph of the answer was verified by the appellant Samuel S. Bunting. The case was put at issue by a reply in denial of the several paragraphs of the answer. The cause was submitted to a jury for trial; verdict and judgment for the appellee.

The appellants filed their written motion for a new trial; the court overruled the motion, and the appellants excepted. The error assigned is, that the court below erred in overruling the appellants’ motion for a new trial.

The reason urged for a new trial, and upon which the appellants rely, is thus stated by their counsel:

“The error which is relied upon is the action of the court in directing appellants’ counsel to refrain from commenting upon the testimony given, relating to a promise made by the appellee to pay appellants for their time and trouble in coming from their homes to Vincennes so often for the machine, and in striking this testimony out of the cause.”

It appeared from the testimony of Thomas S. Bunting, one of the appellants, and other witnesses, that he, in behalf of himself and one of his co-defendants, contracted with the agent of the appellee for the purchase of a threshing machine, to be delivered at Vincennes on the 3d of July, 1877, for the sum of \$1,250, to be paid, one-half in three and one-half in fifteen months, with ten per cent. interest,

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for which notes were to be given, signed by the purchasers, and the other appellants as sureties. The machine did not arrive at the time fixed for delivery, the purchasers called at the place of delivery several times, and were put to some trouble. They complained of the delay, and threatened to buy a machine of one Heberd. The agent of the appellee asked them to wait a day or two longer, and promised to pay them for their trouble. They agreed to do so, and the next day the machine arrived, and the purchasers accepted it. No change in the contract was made, nor was anything said upon the subject. The notes agreed to be executed were sent, some time after the machine had been delivered, to the defendants to be executed; they were signed and returned to the agent. The appellants testified that the last of the notes, the one in suit, had been altered after its execution, by inserting the number 10 between the word "with" and the words "per cent. interest," so as to make the note draw ten, instead of six, per cent. The agent of the appellee and the person who filled up the notes testified that the number 10 was in the note when signed by the makers, and that it had not been altered.

In the argument of the cause, the counsel for the appellants stated to the jury that "it was necessary for them to find, among other things, whether the figures 10 were in the note when it was signed by defendants, and that, in coming to a conclusion upon that point, it was proper for them to consider the fact that on the morning of the 6th of July, 1877, or thereabouts, the plaintiff by his agent, Cosby, who had the notes drawn up, promised to pay the defendants for their time and trouble, as testified by Thomas S. Bunting, and that the jury might, from the testimony of said Bunting, conclude that there was a good and sufficient reason for the blank being left in the note, grounded, as the promise was, upon the consideration that they would not buy a machine from Heberd, and it being an easy and convenient way of

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paying the defendants for their time and trouble." Upon objection being made to this argument, the court held it to be improper, remarking, in the presence of the jury, that what had been testified to by the witness Bunting, as to what Cosby had said in relation to paying the defendants for their time and trouble, was immaterial, and the court then directed counsel to abstain from further remarks upon the subject. This ruling of the court is all that is complained of by the appellants.

The question before the jury was, whether or not the note sued on had been altered after its execution. If the statement of the appellee's agent, Cosby, that he would pay the appellants for the time they had lost, because of the non-delivery of the machine for which the note was given, at the time agreed upon, could have any legitimate bearing upon the question at issue, then the court erred in not allowing counsel to comment upon it, and in remarking, in the presence of the jury, that the evidence was immaterial.

The agreement between the appellee and the appellants was, that the notes should bear ten per cent. interest. This agreement was never changed or modified. The agent, so far as appears from the testimony, had no authority to change it, and he never did. The agent had promised to pay the appellants for their lost time, but he never intimated to them that he had paid them, by the omission of ten per cent. interest in the note in suit, or otherwise; nor did it occur to the appellants that they had been so paid. In view of these facts, the omission of the agent, if such was the fact, to fill up the note so as to draw ten per cent. interest, in accordance with the contract, would not justify, nor logically tend to justify, the inference that the interest was omitted in discharge of his promise to pay the appellants for lost time. The promise of Cosby to pay the appellants for lost time was purely collateral to the fact in issue, and was therefore

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immaterial. The rule is, that collateral facts should be excluded. 1 Greenleaf Evidence, sec. 52.

We think the court did not err in holding that the promise of Cosby to pay the appellants for their lost time was immaterial, nor in requiring the appellants' counsel to refrain from commenting upon it.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things affirmed, at the costs of the appellants.



No. 7445.

SMOCK ET AL. v. HARRISON ET AL.

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APPEAL BOND.—*Approval by Clerk.*—*Consent of Plaintiffs by Attorney.*—*Mutual Waiver.*—*Superior Court.*—Where a superior court in special term fixed the penalty and time of filing of an appeal bond, leaving the approval of the surety to the clerk, and the bond, with the written consent of plaintiffs by attorney endorsed thereon, was approved by the clerk, the defendants, in a suit on the bond, can not dispute the authority of the attorney whose act they have ratified, but the parties must be held to have mutually waived any approval by the court and to have made the bond just as effective as if the statute had been conformed to with technical accuracy.

PLEADING.—*Complaint.*—*Assignment of Error.*—*Intendments in Favor of Pleader.*—*Practice.*—Where a complaint has not been tested by demurrer, and its sufficiency was first brought in question by assignment of error in the general term of a superior court, it must be tested by the rule which is applied to motions in arrest of judgment, and, instead of indulging presumptions against the pleader, all reasonable intendments should be allowed in his favor.

SAME.—*Defects Cured by Verdict.*—Where the *statement* of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor.

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SAME.—*Conclusion of Law.*—*Bond.*—*Supersedeas.*—*Verdict.*—An averment in a complaint not tested by demurrer, “that said appeal bond operated as a supersedeas in said cause,” though, strictly speaking, a mere statement of a legal conclusion, should be regarded as bringing in issue and admitting proof of such facts, if any, as would make the bond have that effect, and after verdict for the plaintiff it must be presumed that such proof was made, if it was legally possible to make it under proper averment.

SUPERIOR COURT.—*Conditions of Appeal Bond.*—*Waiver.*—*Measure of Recovery.*—Granting that the conditions of a bond in case of appeal from special to general term of the Superior court must be directed by the court, the parties may waive that requirement and themselves name the conditions as well as the sureties, and, within the penalty of the bond agreed upon, the amount due on the judgment appealed from is the measure of the recovery which may be had, and this without averment or proof that the judgment defendants have become insolvent.

SAME.—*Practice.*—*General Finding.*—*Later Special Finding not Available.*—A general finding remaining in the record will support the judgment of the court, notwithstanding a special finding and conclusions of law rendered ten days or more thereafter, which purported to be done at the request of appellants made at the commencement of the trial.

From the Marion Superior Court.

D. V. Burns and *C. S. Denny*, for appellants.

J. T. Dye and *A. C. Harris*, for appellees.

WOODS, J.—We are called on to review the errors assigned at the general term of the court below, which are stated substantially as follows :

1. The complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in its conclusions of law.

3. The court erred in overruling the appellants’ motion for judgment on the special findings.

4. The court erred in overruling the motion for a new trial.

5. The court erred in overruling the motion in arrest of judgment.

6. The court erred in requiring the appellants to file an appeal bond in order to stay execution pending the appeal to the general term.

7. The court erred in overruling the appellants’ motion to vacate said order for an appeal bond.

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The complaint in this cause, filed on the 24th day of July, A. D. 1877, is as follows :

“Alfred Harrison and John C. S. Harrison, partners in business under the firm name of Alfred and John C. S. Harrison, complain of William C. Smock, Daniel M. Ransdell, Isaac Smock and Augustus Bruner, and say that heretofore, to wit, on the 17th day of June, 1876, the plaintiffs obtained judgment in the Superior Court of Marion county, on trial in special term, in cause No. 13,891, in said court, against the defendants William C. Smock and Daniel M. Ransdell, and George W. Parker and Samuel Hanway, in the sum of three thousand seven hundred and fifteen and 70-100 dollars (\$3,715.70) ; that the defendants Smock and Ransdell appealed from said judgment in the special term, to the general term of said court, which appeal was granted on the condition that a bond in the penal sum of four thousand dollars (\$4,000) be filed, to the approval of the clerk of said court, within six days, according to the statute in such case made and provided. That the bond herein sued upon (a copy of which is herewith filed and made a part hereof) was executed and filed in accordance with the order of said court, and was approved by the said clerk on July 11th, 1876 ; and that said appeal bond operated as a supersedeas in said cause ; and that execution and other proceedings were stayed upon said judgment during the pendency of said appeal.

“Plaintiffs further say that, on said appeal to the general term of said court, the said judgment at special term was, on the 5th day of March, 1877, in all things affirmed.

“Plaintiffs say that, during the pendency of said appeal, the defendants to the said judgment became insolvent, and that they are unable to collect or enforce payment or satisfaction of their said judgment, and the same remains wholly unpaid.

“Wherefore they pray judgment in the sum of five thousand dollars (\$5,000), and for all proper relief.

“W. S. BARKLEY, Attorney for Plaintiffs.”

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The following is a copy of the appeal bond :

“Know all men by these presents, that we, William C. Smock, Daniel M. Ransdell, Isaac Smock and Augustus Bruner, are held firmly bound unto Alfred Harrison and John C. S. Harrison, in the penal sum of four thousand dollars, for the payment whereof, well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

“Sealed with our seals and dated, this 6th day of July, A. D. 1876.

“Whereas, The said Alfred Harrison and John C. S. Harrison, lately, to wit, on the 17th day of June, 1876, at the special term of the Superior Court of the county of Marion, in the State of Indiana, recovered judgment against said William C. Smock, Daniel M. Ransdell, George W. Parker and Samuel Hanway for the sum of three thousand seven hundred and fifteen dollars and seventy cents, and costs ; and whereas the said William C. Smock and Daniel M. Ransdell have appealed therefrom to the general term of the said Superior Court of Marion County : Now, therefore, the conditions of this obligation are to the effect following, to wit : That if the said appellants will duly prosecute their said appeal, and abide by and pay the judgment and costs, which may be rendered or affirmed against them, then this obligation is to be void, otherwise to remain in full force and effect.

WM. C. SMOCK, [Seal.]

“D. M. RANSELL, [Seal.]

“ISAAC SMOCK, [Seal.]

“A. BRUNER, [Seal.]

“Taken and approved by Austin H. Brown, Clerk.”

“Plaintiffs consent that the clerk may approve the within bond.

“W. S. BARKLEY, Attorney for Plaintiffs.”

The counsel for the appellants “contend that the complaint shows on its face that the bond was executed without con-

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sideration," "did not stay the execution, and that no action can be maintained thereon;" and cite *Ham v. Greve*, 41 Ind. 531.

The 26th section of the act establishing the court in which the judgment was rendered provides, that "such appeal shall stay proceedings upon the action of the special term in the cases, and in the manner that a stay of proceedings is allowed upon an appeal to the Supreme Court from the circuit court, and in none other." 2 R. S. 1876, p. 27. This appeal was taken in term time, and section 555 of the code provides that such an appeal "shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed," etc., "with such penalty and surety as the court shall approve," etc.

The complaint can not be said to be upon a strictly statutory bond. It shows a departure from the requirements of the statute, in so far as the bond was "to be filed to the approval of the clerk of the court." The penalty of the bond and the time for filing were properly fixed by the order granting the appeal, but the approval of the surety was left to the clerk. And, for this reason, it is contended, on the facts averred in the complaint, that the bond was not lawful and operative to stay proceedings.

It is averred in the complaint, that the bond did operate as a supersedeas, but it is said this is not an averment of fact, but of a legal conclusion, which, on the facts alleged, is not a true conclusion.

It is to be observed that the complaint was not tested by demurrer. Issues of fact were formed and a trial had, resulting in a verdict and judgment for the plaintiff; and the sufficiency of the complaint was first brought in question on the appeal to the general term, by the assignment of error hereinbefore stated. In such cases, we think the complaint must be tested by the rule which is applied to motions in arrest of judgment, and, instead of indulging presumptions

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against the pleader, all reasonable intendments should be allowed in his favor, on the ground, as stated in *Alford v. Baker*, 53 Ind. 279, that "Where the *statement* of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor." *The Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294, and cases cited. Applying this rule, the averment that the bond did operate as a *supersedeas*, though strictly speaking a mere statement of a legal conclusion, should be regarded as bringing in issue and admitting proof of such facts, if any there were, as could make the bond have that effect; and, after a verdict for the plaintiff, it must be presumed that such proof was made, if it was legally possible to make it, under proper averment. Was such proof possible in this case? In *Jones v. Droneberger*, 23 Ind. 74, it was held that "The bond was for the individual benefit of the appellee; and the provisions in the statute requiring the court to approve it in term time, and the clerk in vacation, were inserted for the purpose of securing a good bond for the appellee," that the parties may waive the approval of the court or clerk, in any given case, where their own individual interests alone are at stake, and, if they do mutually agree upon a bond, the bond so given is valid. See, also, *Railsback v. Greve*, 58 Ind. 72.

It is not clear that we would not be warranted, after verdict, in holding that this complaint shows sufficiently and affirmatively a waiver of any approval of the bond by the court. With the copy of the bond, which is made a part of the complaint, is set out a copy of the following indorsement on the bond, viz.: "Plaintiffs consent that the clerk may approve the within bond. W. S. Barkley, Attorney for plaintiffs." Without this consent, that is to say, without the consent of the plaintiffs, the bond was not a lawful bond, and could not operate to fulfil its purpose. It was proper

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to indorse the consent on the bond itself, and, when so indorsed and filed, it possessed, as to the objections made to it, every legal requisite to give it efficiency. The indorsement is not dated, but was manifestly made before or near the time of filing with the clerk for approval.

It is not for the appellants to dispute the authority of the attorney who signed the indorsement for the plaintiffs, and whose act is clearly ratified.

“The waiver must be mutual,” say counsel; but this was clearly so. The appellants prepared their appeal bond, and, either directly or through the clerk, presented it to the plaintiffs or their attorney, who consented to it. One party asked, and the other gave, consent to the acceptance of the bond. This made a mutual waiver, and supplied the only fact suggested by counsel, in this connection, as essential to a strictly statutory bond, and made the bond just as effective as if the statute had been conformed to with technical accuracy. It is true that the complaint does not directly aver this waiver, nor refer to this indorsement; and it may be that on demurrer the indorsement would not be regarded as so far a part of the bond as to become a part of a complaint thereon, when filed as an exhibit only, but after verdict in favor of the plaintiff it might, if necessary, be deemed to be a part of the complaint, attacked for the first time in an appellate court. But whether this indorsement may be regarded as a part of the complaint or not, it was put in evidence, and as such, connected with other circumstances in proof, was enough to warrant a finding by the court, that the parties did waive an approval of the bond by the court; and this proof, as before stated, was admissible under the averment that the bond did operate as a *supersedeas*.

This reference to the testimony is, of course, unnecessary to the support of the complaint, but it shows that no wrong is done by applying the rule that the defective averment may be cured by the verdict.

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What we have said already disposes of the motion in arrest of judgment, and also of the motion for a new trial, except as to the claim that the damages assessed are excessive.

Counsel contend that so much of section 555 of the code, as provides that the appeal bond shall be conditioned for the payment of the judgment and costs which may be rendered or affirmed against him, was not adopted by the act establishing the Superior Court; but that the conditions of the bond, in case of an appeal from special to general term, must be directed by the court; and that no conditions having been prescribed, either by statute or by the court, the plaintiffs were not entitled to recover more than nominal damages, without proof that, during the appeal, the judgment defendants became insolvent.

It may be granted that the conditions of the bond should have been prescribed by the court, but it was competent for the parties to waive that and themselves name the conditions, as well as the sureties, and no reason is shown why the appellants should not be held liable according to the conditions of their contract, as they made it and procured the plaintiffs to accept or consent to it. Their undertaking was that the principals in the bond would duly prosecute their appeal, and abide by and pay the judgment which should be rendered or affirmed against them, and, within the penalty of the bond, the amount due on that judgment was the measure of the recovery which could be had on the bond; and this could be had without averment or proof that the judgment defendants were or had become insolvent.

The points made with reference to the conclusions of law, and the motion of the appellants for judgment on the special finding of facts, are much the same as have been considered under the objections made to the complaint, and for that reason we need not make any special reference thereto. It may be observed, however, that the court made a general finding for the plaintiffs, and assessed their damages in the

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sum for which the judgment was finally rendered, and ten days or more thereafter the court rendered a special finding and conclusions of law, which purported to be done in accordance with the request of the appellants, made at the commencement of the trial. The general finding remains in the record. No objection was made to its rendition, and no effort made to expunge or exclude it from the record. The appellants must therefore be deemed to have waived objection to the general finding. It is not apparent how the appellants could avail themselves of any remedy upon the special finding, on exception to the court's conclusions of law; because, in any event, the general finding would remain to support the judgment of the court.

The sixth and seventh assignments present no questions which affect the rights of the parties on this appeal, and we do not deem it necessary to make any decision in reference thereto. Had the appellants been unable, or deemed it worthwhile to refuse, to give the bond required by the court, on the showing made, questions might have arisen which would merit our attention, but now that the bond appears to have been given, it is not probable that any decision of this court as to the sufficiency of the showing on which the court required the giving thereof could affect the rights or liability of the parties thereto.

Judgment affirmed, with costs.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

Sharp *et al.* v. Gutcher.

No. 7976.

SHARP ET AL. v. GUTCHER.

PRACTICE.—*Removal of Cause to United States Court.*—*Time of Application.*—The petition for the removal of a cause from a State court to a Federal court may be made at any time before the trial or final hearing of the suit in the State court.

SAME.—*Void Acts of State Court.*—After a sufficient petition for removal has been filed, the State court can do nothing more than to perfect the removal, and any acts in attempting to retain jurisdiction would be *coram non judice* and void.

SAME.—*Answer.*—An answer setting up the filing of a petition, etc., for removal, is a sufficient answer in bar of further proceedings in the State court.

From the Miami Circuit Court.

C. Clemans, A. C. Clemans and J. Mitchell, for appellants.

J. S. Collins, J. W. Adair, — Collins, J. L. Farrar,
and *J. Farrar*, for appellee.

FRANKLIN, C.—Appellee commenced a suit, with attachment and garnishment proceedings, against appellants, in the Whitley Circuit Court, at the April term, 1877. One of the garnishees filed an answer at that term.

The defendants appeared at the September term of the court and filed separate demurrers to each paragraph of the complaint, which were overruled and excepted to. Defendants then filed an answer and a cross complaint; cross complaint demurred to, overruled and excepted to. Reply filed, and cause continued by agreement.

At the next November term of the court the defendants moved for a change of venue; venue changed to Miami Circuit Court. At the December term of the Miami Circuit Court the cause was continued by operation of law. At the April term, 1878, the cause was continued on the motion and affidavit of defendants. At the June term, 1878, the petition and bond were filed, and motion made, for the removal of the cause to the United States Circuit Court. Over objections and exceptions of defendants, the plaintiff filed

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an answer to the petition for removal; and the motion for removal was overruled by the court, and excepted to by defendants. At the October term of the court defendants filed an additional fourth paragraph to their answer, setting up the proceedings for a removal of the cause as a defence in that court to the action. The plaintiff demurred; demurrer sustained, and excepted to.

A trial by jury was had at the December term, 1878, and a verdict for the plaintiff for \$1,249.84. Motions for a new trial and in arrest of judgment were made, overruled and excepted to, and judgment rendered on the verdict.

In the reasons for a new trial, there were twenty-one causes stated; and in this court eight errors have been assigned.

The first, second, third, and fourth errors assigned embrace the subject of the proceedings to remove the cause to the United States Circuit Court, and may all be properly considered together. The same question is attempted to be presented in the record in four different ways:

1st. The overruling of the motion on the petition, etc.

2d. The sustaining of the demurrer to the fourth paragraph of answer.

3d. The overruling of the motion for a new trial.

4th. The overruling of the motion in arrest of judgment.

Neither in this court nor in the court below have there been any objections raised to the form or substance of the petition and bond in the removal proceedings. The only objection made, and upon which the record shows that the court below decided, was, "The application was made too late." The record requires this court to determine whether the application was made in time for the defendants to procure a removal of the cause to the Federal court.

We have had various acts of Congress upon this subject of the removal of causes from the State courts to the Federal courts. Some of them, in relation to special persons and classes of cases, need not be noticed. Those of a more

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general character were passed in 1789, 1866, 1867, R. S. 1873-4, act of 1875, and the second revised edition of the statutes of the United States, provided for in March, 1877, and certified to in February, 1878.

Upon the subject of the *time* in which the petition should be filed, the act of 1789 provided that it should be done "at the time of entering his appearance." The act of 1867 provided that it should be done "at any time before the final hearing or trial of the suit." The same provision is in the act of 1866.

The Revised Statutes of 1873-4, p. 113, section 639, as to citizenship, provided that the petition should be filed in the state court "at the time of entering his appearance;" and when the additional cause for removal, of prejudice or local influence, as provided for in the act of 1867, was alleged by affidavit, the petition might be filed "at any time before the trial or final hearing of the cause."

The act of 1875 provided that, on account of citizenship, the petition might be filed "before or at the time at which said cause could be first tried, and before the trial thereof." The revision of 1877-8, upon this question, was the same as the revision of 1873-4.

It is insisted, in this case, that the act of 1875, by implication, repealed all former acts upon this subject. And, in the case of *Osgood v. Chicago, etc., R. R. Co.*, 6 Bissell, 332, Judge Drummond, in the opinion, does make such an intimation. But we do not understand him to have so decided; for upon a petition for a rehearing, afterward filed in the same cause, he uses the following language: "These acts were, it is presumed, all repealed by the revised statutes of the United States, which, however, incorporated their substantial provisions in section 639." This decision was made in 1875, and could only have referred to the revision of 1873-4.

In the case of *United States v. Tynen*, 11 Wallace, 88,

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we have the following rule of construction in relation to the repeal of statutes by implication, to wit:

“When there are two acts on the same subject the rule is to give effect to both if possible. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of the act.”

While the act of 1875 was, in some respects, more comprehensive than either of the former acts, yet it did not embrace the additional cause for removal on account of prejudice or local influence, which was embraced in the acts of 1867, and the revision of 1873-4. This provision in the former acts, not being embraced in, nor repugnant to, any of the provisions of the act of 1875, is not thereby repealed.

The provision in regard to time, of the act of 1789, was re-enacted by the revision of 1873-4. But, by implication, was repealed again by the act of 1875, and the time somewhat extended. Where the cause for removal was citizenship alone, instead of the petition having to accompany the appearance, as was required by the act of 1789, and the revision of 1873-4, it had to be filed according to the act of 1875, “before or at the term at which said cause could be first tried, and before the trial thereof.”

This was again attempted to be changed by the revision of 1877-8, and to re-enact the provision of the revision of 1873-4; because the second edition or revision of 1877-8, upon this subject, is a literal copy of the revision of 1873-4. But a very serious question arises, as to whether the second edition or revision of 1877-8 is in force and to be regarded as the law. If it is to be regarded as the law, the difficulty in regard to this question of time is to a very large extent

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removed, because it makes certain that which the act of 1875 leaves uncertain.

By this revision, if a party wanted to remove his cause from the State court to the United States Circuit Court, on account of citizenship alone, he would have to file his petition with his appearance to the cause in the State court ; but, if he desires to also file an additional cause, he could file his petition and affidavit at any time before the trial or final hearing of the suit. And this, we think, would fully comport with the ends of justice. If a party desires to make such application, on account of citizenship alone, he knows all about the fact, and he ought not to be permitted to delay any considerable length of time, and then come into court and ask to take advantage of a fact which he knew from the beginning, and thereby delay the trial of the cause. But it is not so with the additional cause of prejudice or local influence ; it may not be developed, especially to a non-resident, until after the cause has progressed for some time in court, and, when developed at any time before entering into the trial, the party ought not to be deprived of the privilege of having a fair and impartial trial.

But, to recur to the question as to what statute is in force, we find that the revision of 1873-4 was adopted *in solido* by Congress, and the secretary of state was required to certify and publish the same ; but that the second edition, or revision of 1877-8, was not adopted by Congress in any manner. The adoption of the first revision caused considerable complaint, on account of the manner of its adoption, when it was ascertained that the revisers had taken the liberty of making a number of changes ; hence Congress refused to do the same thing again, in regard to the revision of 1877-8, but passed an amendatory act, March 9th, 1878, providing that when the revision was completed the secretary of state should examine and approve it, and compare it with the amendatory acts, then certify the same under the seal of the

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United States. It should then be legal evidence of the law therein contained, in all the courts of the United States and of the several states and territories; but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, 1873.

The revision was certified to February 18th, 1878. Under these provisions, this second edition is to be considered as a compilation of the statutes of the United States, and it admits of examination to determine its correctness. And there being a discrepancy between the first subdivision of the 639th section and the act of 1875, this subdivision is inoperative and not in force. That leaves the question thus: When the cause for removal is on account of citizenship alone, the time for filing the petition is controlled by the act of 1875. When the cause is for citizenship and prejudice, or local influence, the time for filing the petition is controlled by the third subdivision of the said 639th section of the second edition or revision of 1878.

In this case, the necessary affidavit of prejudice and local influence was filed with the petition, and therefore brings this case under the operation of the act of 1867, and both the revisions of 1873-4 and 1877-8; and, as to that, leaves the latter revision in force, under which this petition, etc., could be legally filed, "at any time before the trial or final hearing of the suit."

Judge DILLON, in his recent valuable treatise on the Removal of Causes from the State courts to the Federal courts, in speaking of the time for the application, uses the following language, in section 59, p. 73: "Under the Acts of 1866 and 1867 (now Revised Statutes, section 639, subdivisions 2 and 3), the time is enlarged, and the petition for the removal may be made 'at *any time before* the trial or final hearing of the suit' in the State court. The word 'trial' refers to cases at law—'hearing,' to suits in equity. Under

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this language the petition for the removal *may*, it is certain, be made at any time before entering upon the final trial, or the hearing on the merits.” And, in support thereof, he refers to the following authorities :

Stevenson v. Williams, 19 Wal. 572 ; *Vannevar v. Bryant*, 21 Wal. 41, 43 ; *Waggener v. Cheek*, 2 Dillon, 560 ; *Kellogg v. Hughes*, 3 Dillon, 357 ; *Dart v. McKinney*, 9 Blatchf. C. C. 359 ; *Johnson v. Monell* (change of residence pending suit), Woolworth 390 ; *Minnett v. Milwaukee, etc., Railway Co.*, 3 Dillon, 460, denying *Galpin v. Critchlow*, 13 Am. L. Reg. (N. S.), 137 ; S. C., 112 Mass. 339, and *Whittier v. Hartford Fire Ins. Co.*, 14 Am. L. Reg. (N. S.), 621 ; S. C., 55 N. H. 141 ; see *Insurance Co. v. Dunn*, 19 Wal. 214, 225 ; *Akerly v. Vilas*, 1 Abb. U. S. Rep. 284 ; S. C., 2 Bissell, 110 ; *The Justices v. Murray*, 9 Wal. 274 ; *Miller v. Finn*, 1 Neb. 254 ; *Brice v. Sommers* (N. D. Ohio, Welker, J.), 8 Chicago Legal News, 290 (1876) ; *Fasnacht v. Frank* (U. S. Sup. Court, Oct. 1874), 23 Wal. 416 ; *Craigie v. McArthur*, 9 Chicago Legal News, 156.

Under the foregoing authorities, we think that the application, in this case, was not made too late.

The right to remove a cause, under all the acts of Congress providing for removals, is a right conferred directly by the act of Congress, and is not dependent upon the volition or action, or non-action of a State court. When a petition for removal and surety is filed in the State court, in conformity with the acts of Congress, that court can only refuse upon some defect in the petition, or insufficiency in the surety or affidavit of prejudice or local influence. The application is *ex parte*, and depends upon the papers upon which it is founded. No notice is required, and no counter affidavits or pleadings are permitted. Upon the face of the papers, the jurisdiction of the State court over the cause is transferred to the Federal court, and the State court can do nothing more with the cause, except to perfect the removal. Any

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acts of the State court thereafter done, in attempting to retain jurisdiction over the cause, would be *coram non judice*, and void. *The Indianapolis, etc., R. W. Co. v. Risley*, 50 Ind. 60; *Fisk v. The Union Pacific R. R. Co.*, 8 Blatchf. C. C. 243; *Fisk v. The Union Pacific R. R. Co.*, 6 Blatchf. C. C. 362; *Matthews v. Lyall*, 6 McLean, 13; *Stewart v. Mordecai*, 40 Ga. 1; *United States v. Tynen*, 11 Wal. 88; *Osgood v. Chicago, etc., R. R. Co.*, 6 Bissell, 330; *St. Anthony Falls W. P. Co. v. King Bridge Co.*, 23 Minn. 186; *New York W. & S. Co. v. Loomis*, 122 Mass. 431; *Ayres v. The Western R. R. Corp.*, 45 N. Y. 260; *Taylor v. Rockefeller*, 18 Am. L. Reg. (N. S.) 298; *Ex parte Grimbball*, 61 Ala. 598; *Scott v. Clinton, etc., R. R. Co.*, 6 Bissell, 529; *Burson v. The National Park Bank of New York*, 40 Ind. 173.

An answer setting up the filing of a petition, etc., for removal, is a sufficient answer in bar to further proceedings in the State court. *The Indianapolis, etc., R. W. Co. v. Risley*, 50 Ind. 60; *Ayers v. The Western R. R. Corp.*, 45 N. Y. 260.

We think the court below erred in overruling the application for removal, and in sustaining the demurrer to the fourth paragraph of defendants' answer.

For these errors the judgment must be reversed. And it is unnecessary to decide upon the other assigned errors.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at the costs of the appellee. And the cause is remanded with instructions to the court below to accept the surety and grant the application to remove the cause to the United States Circuit Court, and to perfect the same.

Robinson *et al.*, Executors, *v.* Brown *et al.*

No. 8218.

ROBINSON ET AL., EXECUTORS, *v.* BROWN ET AL.**PRACTICE.—Endorsement on Complaint Fixing Return Day of Summons.—**

Statute Construed.—Attorney.—Where, under section 315 of the code, as amended by the act of March 6th, 1877, Acts 1877, Reg. Sess., p. 105, the endorsement upon a complaint directing the clerk to issue a summons, and fixing the day of the term upon which the defendant shall appear, is signed “W. & T., Att’ys,” who had signed and filed the complaint, such endorsement is sufficient to authorize the clerk to issue a summons for the defendant to appear and answer the complaint on the day named.

From the Shelby Circuit Court.

D. L. Wilson, J. W. Thompson, T. B. Adams and L. T. Michener, for appellants.

N. B. Berryman, for appellees.

MORRIS, C.—This suit was commenced by the appellants against appellees upon a promissory note. The complaint was in the usual form. A summons was issued by the clerk, returnable, in accordance with directions endorsed upon the complaint, on the 11th day of October, 1878, which was served on the defendants, the appellees, on the 1st day of October, 1878. On the 11th day of October, 1878, the appellees were called, and, failing to appear, judgment was taken against them by default. On the 14th day of October, 1878, the appellee Wingate, upon his affidavit, moved the court to set aside the default and judgment, for the reason, as stated, “that the complaint was filed on the first day of the present term; that there was written on the back of the complaint the following pretended direction to the clerk of this court: ‘Clerk will issue summons requiring defendants herein to appear and answer the within complaint, Oct. 11th, 1878, the same being the 11th judicial day of the present term. Wilson & Thompson, Att’ys.’ That, upon the filing of said complaint, the clerk of this court improperly and illegally issued a pretended summons requiring the defendants to answer on the 10th day of the present term.”

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The court sustained this motion, set aside the default and judgment, quashed the summons and dismissed the action, to all of which the appellants objected and excepted.

The errors assigned are, that the court erred in sustaining said motion and setting aside the default and judgment, in quashing said summons, and in dismissing said action.

The only question discussed by counsel is, was the endorsement on the complaint, directing the clerk to issue a summons, fixing the 11th day of October, 1878, for the appearance of the defendants, sufficient? The counsel for appellees says: "If the endorsement on the complaint was a sufficient compliance with section 315, p. 105, Acts 1877, to authorize the clerk to issue the summons, returnable on the eleventh day of the term, and the court to render judgment thereon by default, then the court erred in sustaining the appellees' motion."

There is some confusion in the record as to dates, but, as the only question discussed by counsel is that above stated, we shall not notice them.

The objection to the endorsement on the complaint is, that it was not signed by the plaintiff, nor by his attorneys; that the signature of his attorneys to the endorsement, as "Att'ys," without stating that they were the attorneys of the plaintiffs, is insufficient. Wilson and Thompson were the attorneys of record for the plaintiffs; their names were signed to the complaint, as attorneys, and to the endorsement.

The statute provides, "That when the complaint is filed, whether before or during any term of court, the plaintiff may fix the day during such term, by endorsement thereof upon the complaint at the time of filing the same, on which the defendant shall appear, which day, when so fixed, shall be stated in the summons when issued, and the action shall be docketed in its order."

The object of the endorsement is to enable the clerk, in issuing the summons, to specify therein the day upon which

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the defendant shall appear. If a plaintiff files his complaint, with an endorsement thereon requiring the clerk to issue a summons, and to name therein a certain day in term for the appearance of the defendant, the clerk would, we think, be authorized to regard the endorsement as a valid direction to him by the plaintiff, though the plaintiff's name was not subscribed to the endorsement. The statute does not, in terms, require the plaintiff to subscribe his name to the endorsement, and the only purpose which his signature could subserve would be to identify the endorsement as his. But the fact, that such endorsement was made upon the back of his complaint, would identify it as fully and as satisfactorily as would his signature. But, however this may be, the attorneys who signed the complaint, signed their names to the direction endorsed upon it, as attorneys, though they did not add that they were the attorneys of the plaintiffs. The endorsement thus signed was acted upon by the clerk. He seems to have had no difficulty in reaching the conclusion that the direction proceeded from the plaintiffs, who filed the complaint upon which it was endorsed; nor, with the facts before him, do we see how he could have acted otherwise than he did.

It is said that the case of *Fontaine v. Houston*, 58 Ind. 316, shows that the decision below was correct. In that case the affidavits in question did not contain the facts required by the statute. Here, the endorsement does contain all the facts required, the only question being, Did the plaintiff make or authorize the endorsement to be made? It appears that the endorsement was made by the attorneys who signed and filed the complaint. We think this was sufficient, and that it justified the clerk in issuing the summons requiring the appellees to appear and answer the complaint on the day named.

We think the judgment should be reversed.

PER CURIAM.—It is ordered, upon the foregoing opinion,

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that the judgment below be in all things reversed, at the costs of the appellees; that the cause be remanded with instructions to the court below to reinstate said cause upon its docket, and also to reinstate the judgment.

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168 590

No. 9506.

MASSEY v. THE STATE.

LIQUOR LAW.—“*Barter and Sell.*”—The averment in an indictment for the unlawful sale of liquor, that the defendant did “unlawfully barter and sell” certain intoxicating liquor, for the price of ten cents, imports a sale and not a barter.

SAME.—*Sale.*—A sale implies the transfer of property for money, though time may be given for payment.

SAME.—*Sale to Minor.*—*Insufficiency of Evidence.*—*Variance.*—On the trial of a defendant indicted for selling intoxicating liquor to a minor, evidence that the minor in payment therefor gave the defendant two pool-checks, worth five cents each, which had been sold by the defendant at five cents each, to be taken up in beer, does not show a sale, and constitutes a material variance.

From the Benton Circuit Court.

M. H. Walker and *L. D. Hawley*, for appellant.

D. P. Baldwin, Attorney General, and *D. L. Bishopp*, Prosecuting Attorney, for the State.

WORDEN, J.—The appellant was indicted in the court below for selling liquor to a minor, the indictment charging that the defendant did “unlawfully barter and sell to one William Wood a certain intoxicating, spirituous and malt liquor, in a less quantity than a quart at a time, to wit, one half-pint of spirituous and malt intoxicating liquor, at and for the price of ten cents,” with an averment of the minority of Wood.

On trial the defendant was convicted, and a motion made

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by him for a new trial was overruled. The evidence on the subject of the sale was as follows :

Levi Waldrup testified : “I was in the defendant’s saloon the forepart of September, 1880. I saw William Wood drink two glasses of lager beer. It was less than a quart. Wood gave the defendant two pool-checks for the beer. The beer was sold by the defendant to Wood in Oxford, Benton county, Indiana, during the first part of September, 1880. * * I knew the liquor was intoxicating. * * * Wood got the liquor of the defendant. * * * I am positive it was lager beer.”

John A. Cox testified : “In September last defendant kept saloon in Oxford. I was there when Waldrup, the marshal, was. I took some beer with Wood ; it was intoxicating liquor ; it was what we call lager beer. It would make a man drunk if he would drink enough of it. It was a less quantity than a quart. Wood turned over checks that we call pool-checks for the beer. The pool-checks were worth five cents a piece, and were sold by the defendant at five cents each, to be taken up in beer. The beer was worth five cents a glass. Wood called for the beer, and asked me to drink with him, and I did so.”

The appellant claims that there was a fatal variance between the allegation and the proof, in this, that he was charged with selling spirituous and malt liquor, whereas the proof shows the sale of malt liquor only. We pass this question, as there is another variance between the proof and the allegation, also insisted upon by the appellant, which, we think, is fatal to the conviction.

The indictment must be construed as charging a sale of the liquor, as it is alleged to have been sold for the price of ten cents. This imports a sale, and not a barter, and the word “barter,” in the indictment, may be regarded as surplusage. *Leary v. The State*, 39 Ind. 360. Regarding the indictment

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as charging a sale of the liquor to Wood, it remains to inquire whether the evidence supports the allegation.

Wood paid no money for the liquor, nor did he buy it upon credit to be thereafter paid for in money. He exchanged the pool-checks for it. A sale implies the transfer of property for money, though time may be given for payment. *Stevenson v. The State*, 65 Ind. 409.

It was shown that the defendant sold the pool-checks at five cents a piece, and that they were worth five cents, and were to be taken up in beer. It does not appear, however, if that would make any difference in the case, that the defendant sold the checks to Wood, or how or from whom Wood got them.

The case is simply this: Wood had in his possession two pool-checks, which the defendant had sold to some one at five cents a piece, which were worth five cents a piece, and were to be taken up in beer. These pool-checks Wood exchanged for the beer. It seems to us to be clear that this was not a sale of the beer to Wood.

The judgment below is reversed, and the cause remanded for a new trial.

No. 7498.

VANCE ET AL. v. VANCE ET AL.

WILL.—*Action to set aside.*—*Evidence.*—*Conversations.*—*Practice.*—Upon the trial of an action to set aside a will, on account of the alleged mental unsoundness of the testator and the use of undue influence, it is not error to exclude evidence of conversations of the testator, which do not tend to prove either unsoundness of mind or the exercise of undue influence.

SAME.—*Instruction.*—*Practice.*—*Directing Verdict.*—*Evidence.*—Where, in such case, the evidence submitted to the jury is insufficient to entitle the plaintiff to a verdict, it is the duty of the court to instruct the jury to return a verdict for the defendant.

74	370
136	383
74	370
137	211
74	370
152	277

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From the Henry Circuit Court.

J. H. Mellett and *E. H. Bundy*, for appellants.

J. Brown and *J. T. Mellett*, for appellees.

BICKNELL, C.—This was a suit by the appellants, who were the children and heirs at law of David Vance, deceased, against the appellees, who were a son and the widow of the deceased, to set aside his last will.

The complaint alleges unsoundness of mind in the testator, and that the execution of the will was procured by undue influence. The language of the complaint is, that the testator was “not of sound mind,” and that “said last will was unduly executed.” It is not averred by whom the supposed undue influence was exerted. The defendants answered by a general denial. The issues were submitted to a jury. Evidence was introduced by the appellants, but the appellees offered no testimony.

During the trial, the appellants proposed to prove certain conversations of the testator with three of his daughters. One of them was, that about three years before the making of the will, the daughter, at a Baptist meeting, asked her father if he would have something to eat, and he said yes, and stretched out his hand to receive it, when the appellee Jane Vance, his wife, told him not to take it, and he did not take it. Another was, that in September, 1875, the testator said to another daughter, that his wife was worrying him to death about making a will, and sitting up of nights and refusing to go to bed, and he was afraid she would go crazy; to which the daughter replied, “You had better make the will,” and he answered, “Some things I’ll do to please her, and some things I won’t.” Another was a conversation, like the last, between the testator and another daughter, in which the testator also said: “I do not intend to do it; the law of Indiana is a good enough will for me.”

The court refused to permit these conversations to be given

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in evidence ; the appellants offering to prove them, for the purpose of showing that the appellee Jane Vance, the testator's wife, had "absolute control and power" over his will, actions and conduct, and also to prove the unsoundness of his mind. The proper exceptions were taken to these refusals. The jury found a verdict for the appellees.

The appellants moved for a new trial, because, first, the verdict was not sustained by sufficient evidence ; second, the verdict was contrary to law. The third, fourth and fifth reasons for a new trial alleged error of the court in refusing to allow proof to be made of the conversations, hereinbefore mentioned, between the testator and his three daughters.

The sixth reason for a new trial alleged error of the court, in instructions given to the jury of its own motion, which instructions were as follows : "The evidence of the plaintiffs in this case is not sufficient to entitle them to a verdict ; you will therefore return a verdict for defendants." This was all the charge given to the jury by the court. The only error assigned here is, that the court below erred in overruling the motion for a new trial.

The verdict was in accordance with the evidence, and was not contrary to law. It appeared that the testator was more than seventy years old. Five or six years before he made his will, he was injured by a falling tree, which knocked out one eye and produced a cataract in the other, with partial paralysis of the left side of his body. For about a year he was entirely blind, and he had to be led about like a child ; but his remaining eye was cured by a doctor in Cincinnati, and thereafter he could see very well and could attend to his affairs. His age and the shock of his severe injuries made him feeble, and sometimes irritable and childish, and, as the witnesses said, "notionate ;" but no witness testified that his mind was unsound, or that he was under the undue influence of anybody. A feeble old man, hurt as he was, would naturally rely, and ought to rely, on the woman who

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had borne and brought up his large family of well-to-do-children, and she ought to watch over him and care for him, as this woman did; but there is not a sign, in the evidence, of undue influence of any sort, nor is there any indication of unsoundness of mind. He wrote his will; he took it to the town; he sought out his witnesses, told them he was going away and wanted to settle his affairs, and that the paper he showed them was his will, and he told them where to sign their names. The will itself is a sound and judicious instrument, with no mental weakness about it; it provides for his wife for life, and afterward for his children, giving the girls the portions usual in such cases, and a larger share to the two sons, somewhat more to the younger than to the elder. There is nothing extraordinary in these provisions, and the special directions in the will show sagacity and sound judgment.

We think there was no error in excluding the evidence of the conversations with the three daughters. It was altogether immaterial; none of it had any tendency to prove either unsoundness of mind or undue influence. It was clearly within the discretion of the court to exclude it.

The charge of the court was fully warranted by the testimony. Where, upon the trial of an action by a jury, there is no evidence submitted to the jury, which shows a cause of action in the plaintiff, it is the duty of the court to direct the jury to find for the defendant. *Dodge v. Gaylord*, 53 Ind. 365. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

The State v. Barron.

No. 9282.

THE STATE v. BARRON.

74	374
149	165

CRIMINAL LAW.—Forfeiture of Bail Deposit.—Prosecuting Attorney.—Docket Fees.—Percentage on Forfeited Recognizance.—A prosecuting attorney is entitled to, and should be allowed, the same docket fee upon the forfeiture of money deposited as bail, as upon a forfeited recognizance, such fee to be paid out of such forfeited money; but he is not entitled to a percentage thereon, unless he has prosecuted to final judgment a suit for the recovery of the forfeited money, and then only to a percentage on the amount collected.

SAME.—Fees of Clerk and Justice of the Peace.—A court has no authority to direct the payment of the clerk's fees, or the costs of the justice of the peace by whom a defendant was committed, out of the forfeited money deposited by him as bail.

From the Jackson Circuit Court.

D. P. Baldwin, Attorney General, and *F. L. Prow*, Prosecuting Attorney, for the State.

Howk, C. J.—It appears from the record of this cause, that prior to the September term, 1880, of the Jackson Circuit Court, the appellee, Elijah Barron, had been arrested and examined before a justice of the peace of Jackson county, on a charge of grand larceny, and, in default of bail in the sum of \$500, had been committed by the justice to the county jail. After his commitment to the county jail, the appellee deposited with the clerk of the circuit court the sum of \$500 in money, and was discharged from custody. At the September term, 1880, there was no grand jury in session, and the court ordered that said money should remain in the clerk's hands, as security for the appellee's appearance on the first day of its next term, etc. At the November term, 1880, of said court, an indictment was duly found and returned by the grand jury against the appellee, for the same felony. Thereupon, the appellee, having been "three times audibly called," came not but made default; the court ordered that the said sum of \$500 be forfeited to the common school fund of this State, and be paid by the

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clerk into the county treasury of Jackson county ; to which decision of the court, in ordering the money to be paid into the county treasury, the State, by its prosecuting attorney, at the time excepted.

The State, by its prosecuting attorney, has properly reserved, and presented for the decision of this court, the following questions of law :

1. Was the prosecuting attorney, upon the facts above stated, entitled to the same docket fee upon the forfeiture of said sum of \$500, as upon a forfeited recognizance?

2. Upon the facts stated, was the prosecuting attorney entitled by law to a commission of ten per cent. on the amount of said forfeited money?

3. Was the clerk of the circuit court entitled by law to the payment of his fees in this case, out of the forfeited money? and,

4. Was the justice of the peace lawfully entitled to the payment of his fees out of said forfeited money?

In section 23½ of the fee and salary act of March 12th, 1875, it is provided that "The circuit and criminal circuit prosecuting attorney's fees shall be as follows, to wit:

* * * Docket fee upon forfeited recognizance - - - - \$10.

"And when he prosecutes to final judgment against the defendant, ten (10) per cent. on money collected." 1 R. S. 1876, p. 475.

Under the provisions of this section, it seems to 'us that the prosecuting attorney was entitled to a docket fee of ten dollars, upon the forfeiture of the money which had been deposited by the appellee, in lieu of bail, with the clerk of the court. Such a deposit of money was expressly authorized by section 40 of the criminal code, in the place of giving bail ; and, in section 47 of the same code, provision is made for the forfeiture of "money deposited as bail," in the same manner and for the same causes that a recognizance of bail might be forfeited. We know of no good reason, therefore,

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why the prosecuting attorney is not entitled to, and should not be allowed, the same docket fee, upon the forfeiture of "money deposited as bail," as upon a "forfeited recognizance." In our opinion, the court ought, in this case, to have allowed the prosecuting attorney a docket fee of ten dollars upon the forfeiture of the money, and to have ordered the clerk to pay such docket fee out of the forfeited money.

The next question reserved by the State relates to the right of the prosecuting attorney, upon the facts stated, to a fee of ten per cent. on the money forfeited. It is very clear, we think, from the language of the statute above quoted, that, in this case, the prosecuting attorney was not entitled to a fee of ten per cent. on the forfeited money. He would not be entitled to any such percentage, unless it appeared that he had prosecuted to final judgment a suit for the recovery of the forfeited money; and, even then, he would only be entitled to ten per cent. on the money collected on such judgment. *Ex parte Ford*, post, p. 415. The court committed no error in refusing to allow the prosecuting attorney ten per cent. of the forfeited money, upon the facts shown by the record of this cause.

We know of no law, and the attorneys of the State have referred us to none, which would have authorized the court to direct the payment of the fees and costs either of the clerk or of the justice of the peace in this case, out of the forfeited "money deposited as bail." No error was committed by the court, therefore, as it seems to us, in refusing to order the payment of such fees and costs of such clerk or justice, out of such forfeited money.

The order of the court, therefore, is reversed as to the first question reserved, and the cause is remanded with instructions to allow the prosecuting attorney a docket fee of ten dollars, and to order the payment thereof out of said forfeited money; and as to the second, third and fourth questions reserved, the order is affirmed.

Eberwine *et al.* v. Cook.

No. 7529.

EBERWINE ET AL. v. COOK.

74	377
140	580

LANDLORD AND TENANT.—*Notice to Quit, when Unnecessary.*—Notice to quit is never necessary unless the relation of landlord and tenant subsists; and where one in possession repudiates the relation of tenant to his landlord, or of vendee to his vendor, if he enters under a contract of purchase and sets up a hostile claim to title, no demand of possession or notice to quit is necessary before suit.

From the Knox Circuit Court.

F. W. Viehe and *R. G. Evans*, for appellants.

W. H. De Wolf, *S. N. Chambers*, *G. G. Reily*, *W. C. Johnson* and *W. C. Niblack*, for appellee.

NEWCOMB, C.—This was an action by the appellee against the appellants, to recover certain real estate in the city of Vincennes. There were two trials below, each resulting in favor of the plaintiff. No question of law was reserved at the trial. The case comes here on the evidence alone.

The plaintiff below claimed title by deed from Matilda Daniels, her grandmother and the mother of the defendant, Eliza Eberwine. The latter claimed under an alleged parol contract and purchase from Matilda Daniels, and averred that she had performed her part of the contract, had been let into possession, and had made valuable improvements.

The evidence was conflicting, and the jury could have found either way without rendering their verdict obnoxious to the charge that it was not sustained by sufficient evidence. We can not, therefore, disturb the verdict on that ground.

It is claimed, however, that, conceding that the verdict must stand so far as it determines the ownership of the property in controversy, the evidence established the relation of landlord and tenant between the plaintiff and defendants, and that the latter were entitled to notice to quit before suit. The possession of the defendants was under a claim of ownership of the premises. They never acknowledged

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themselves to be tenants of the plaintiff, nor did she claim that they were her tenants. Notice to quit is never "necessary unless the relation of landlord and tenant subsists. Thus, if one in possession repudiates the relation of tenant to his landlord, or of vendee to his vendor, if he enters under a contract of purchase and sets up a hostile claim to title, no demand of possession or notice to quit is necessary."

1 Washburn Real Property, 4th ed., p. 600.

The judgment of the circuit court should be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the cost of the appellants.

No. 7435.

THE CITY OF LOGANSFORT v. JUSTICE.

CITIES AND TOWNS.—Notice to Councilman of Defects in Street or Bridge.—

Under the statutes of this State, notice to a councilman of a city, of the dangerous condition of a street or bridge within the city, is notice to the city. ELLIOTT, J., dissents.

SAME.—Agents.—Notice.—In this State, for the purpose of receiving notice, councilmen of a city are at all times the agents of the city.

SAME.—Continuance of Defective Condition of Bridge.—Presumption of Notice.—Notice to a city of the defective condition of a bridge therein will be presumed from the continuance of such condition a sufficient length of time for the officers of such city to have had an opportunity to learn of such defect.

SAME.—Diligence in Making Repairs.—A city is responsible only for reasonable diligence to repair defects in its streets or bridges, or to prevent accidents therefrom after such defects are known, but where, on failure, after notice in due time to have made repairs of such defects, an injury occurs therefrom, the city is liable.

SAME.—Measure of Damages.—Loss of Business.—Evidence.—In an action by a physician against a city, to recover damages for a personal injury received on account of a defective bridge, proof of his professional

74	378
124	480

74	378
137	621

74	378
148	278

74	378
171	503

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earnings before and after the injury is admissible in evidence under a special allegation of damages on account of loss of business, not as a basis or measure of damages, but as aiding the jury in estimating the compensation to be awarded.

SAME.—Instruction.—Assumption of Fact.—An instruction that, “If the bridge in question, being within the city, was defective,” etc., does not assume that the bridge was within the city.

From the Cass Circuit Court.

M. Winfield, for appellant.

D. C. Justice, for appellee.

WOODS, J.—This was an action by the appellee, against the appellant, to recover damages for an alleged injury to the plaintiff, received in driving over a bridge across a certain ditch in the city, which, it was alleged, the city had negligently suffered to be and remain out of repair.

The complaint, having stated the plaintiff’s profession to be that of a physician and surgeon, and the injury, alleges “that before and at that time his professional services, as a physician and surgeon, were of the value of \$500 per month, and he was realizing and earning that sum therefrom ; and by reason of the injury to his body, and his great pain aforesaid, he was wholly incapacitated, and rendered unfit and unable to practice his profession, and compelled to remain within doors, and lost, for that time, his aforesaid practice and the emoluments thereof, for a period of eight months, to his damage of four thousand dollars,” etc.

Issue, trial, verdict and judgment for the plaintiff for the sum of \$1,133. .

The questions discussed by counsel for the appellant arise on the motion, made and overruled, for a new trial ; and they will be considered in the order presented by counsel.

The court gave the following instruction upon the subject of notice to the city of the defective condition of the bridge, viz. : “Notice to the councilmen or street commissioner is notice to the city.”

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It is insisted that this instruction is wrong in so much as it declares that notice to the councilmen is notice to the city. The argument is, that councilmen, regarded as individuals and not as a collective body, or as a committee of the collective body, have no powers over, and are charged with no duties with respect to, the streets of the city, and therefore that notice to them of a defect in a street does not affect the city. The argument appears not to be destitute of foundation; and, if the premise be conceded, the conclusion must probably follow. It may be observed, however, that the argument proceeds upon a phraseology somewhat different from that of the instruction. The latter says "notice to the councilmen," which naturally, if not necessarily, means all of them; not some, or any of them, as is assumed in the argument. It is not an apt mode of expression, to say "the councilmen," if reference is intended to the members of the council in their individual capacities and relations; and embracing, as it naturally does, all the members, the phrase is not inapt, when a reference to the collective body is intended. Their coming or being all together, except in connection with their official duties, would be an unusual and improbable occurrence; and a reference to them as "the councilmen," in the instruction, may well be said to have meant the official body of councilmen. Properly understood, therefore, the instruction was not erroneous upon the theory of law advanced by the counsel; and, if he was apprehensive of a mistaken understanding of it, he should have moved for such explicit qualification or further instruction as was deemed necessary.

But suppose the instruction be interpreted as meaning the councilmen as such, but not as assembled in council; are they, or are they not, charged with any duty in reference to the streets of the city? Among the powers expressly conferred on the common council, as a body, is to "have exclusive power over the streets, highways, alleys, and bridges,

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within such city, * * * * and to make repairs thereto.” Sec. 61, act of March 14th, 1867; 1 R. S. 1876, p. 300. This power, as well as many others conferred in the same act, greatly concerns and affects the public welfare as well as private rights; and, to the end that public and private interests may not suffer from a failure to exercise, or from negligence in the exercise of, such powers, the law gives an injured party a remedy in damages against the city itself. To the same end it is provided in the law, that “The common council shall hold stated meetings at least twice in each month, and the mayor, or any five councilmen may call special meetings.” Sec. 47 of act of March 14th, 1867. The provision for calling special meetings of the council was doubtless enacted in consideration of the fact, demonstrated by experience, that emergencies will arise, or may be reasonably expected to occur, requiring the early or immediate action of the council, and when, to await the time for a regular meeting, might entail disaster and loss, or at least the hazard of loss and liability, on the city. The power to call the council together in special meetings may as well, and perhaps more frequently, be exercised in reference to the condition of the streets and bridges within the city, as any other subject of control by the council. The power to call such meetings, by necessary implication, imposes the duty to make the call in proper cases. It is true that five councilmen are required to concur in the call, but the duty rests on each who has notice of the emergency, for it is manifest that the refusal of any one of five who know of the necessity of a meeting, to join the other four in a call therefor, would not excuse the city from liability arising out of the failure to call such meeting. The duty growing out of the power to call special meetings, in proper cases, being, therefore, an individual duty imposed on each member of the council, it is incumbent on each, when informed of an emergency which requires the action of the common

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council, to notify the mayor or other councilmen, who may join in the necessary call; and, if he negligently fails to perform this duty, the city is liable to any one who may suffer injury thereby.

We conclude, therefore, that notice to a councilman of a city, of the dangerous condition of a street or bridge within the city limits, is notice to the city. Our conclusion is fortified by a reference to the provisions of the law concerning the duties and powers of the street commissioner, as found in section 28 of the act of March 14th, 1867, already referred to, namely:

“Sec. 28. It shall be the duty of the street commissioner, under the direction of the common council, to superintend the streets, alleys, market places, landings, the construction, repairing, cleaning and lighting the same, the building of sewers and drains, the purchase of the necessary implements of labor and the employment of laborers, and shall perform all the other duties incident to his office: *Provided*, He shall have no power to contract for any debt or liability against the city, unless specially authorized so to do by an order, resolution, or ordinance of the common council, made in accordance with the powers vested in such council by this act.”

But, if the powers of the street commissioner were more ample and free from restriction, it would still be true, under the other provisions of the law to which we have adverted, that the councilmen have power, and a consequent duty, in reference to the streets of the city; and, this conceded, nothing is wanting to support the conclusion already announced. The wisdom of the rule, which makes notice to councilmen notice to the city, is shown by a consideration of the fact that councilmen are elected from the different wards of the city, and each is likely to observe, or at least soon to learn of, the dangerous condition of any of the streets or bridges in his ward or neighborhood, and by prompt action to secure the necessary repairs or protection against danger.

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In the dissenting opinion it is affirmed to be the universal rule, "that the governing officers of a corporation, such as directors and trustees, must, in order to bind the corporation, act as a collective body, and in regular and lawful session," and that this rule applies with peculiar force to the officers of municipal corporations "discharging duties for the benefit of the public, and not for the promotion of private interests."

This principle is doubtless true and applicable to all subjects concerning which the council must act, if at all, as a body, but it does not seem to us to apply to the subject of notice. Notice to the street commissioner, or to the mayor, is not notice to the council itself, but is notice to the city, on which the council must act, in order to save the city from liability; and the application of the rule contended for would relieve the council from the responsibility of acting on such notice, as well as upon notice to an individual member of the council. The street commissioner and mayor themselves can do nothing to repair a street or broken bridge, if it requires the incurring of any debt or liability against the city, and yet notice to them is sufficient. The mayor can discharge his duty by calling the council together for the purpose of enabling it to take steps to have the street made good. But suppose the councilmen ignore the call of the mayor, and neglect to assemble in lawful session; the repairs are not made, and some one is injured. The city is held liable, but why? Not on account of any fault of the mayor or street commissioner; they have each done their whole duty, under the powers conferred on them; not on account of any negligence of the common council, because that has not been in session, and could not act. But, unless there has been fault somewhere and in somebody who represented the city, there can be no liability at all. It is clear that the only fault is in the individual councilmen, in failing to assemble, and for that fault the city is made responsible.

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If the doctrine is enforced, that the city is not liable for the conduct of councilmen, but only on account of the action of the council in lawful session, then notice to all the councilmen, though assembled together in the council hall, would not be good if given just before the commencement or just after the close of the session. Such a proposition does not command the assent of conscience and reason, and can hardly be accepted as the rule of law. For the purpose of receiving notice, the councilmen of a city, under our statute, are at all times the agents of the city, and within a reasonable time after receipt of notice, must move in the discharge of the duty so imposed upon them. It may be said that the presumption is that the council has furnished, and put at the disposal of the ministerial officers, the funds necessary to meet the expenses of emergencies, but presumptions of such a nature are by no means always true, and the rules of law must be applicable in all cases, and wherein the presumptions fail as well as when they hold good. It may be enough to guard against danger, without making repairs, and the ministerial officers in most cases may be bound and able to provide the necessary safeguards; but cases are supposable when they cannot do so. The mayor and street commissioner may be absent from the city, or sick, or dead; or they may have resigned; and in such cases, unless notice to the councilmen be good, there could be no notice at all. In such cases, the public interests imperatively require that the councilmen shall represent the city; and, it being conceded that notice to the councilmen must be good in some cases, there can be no good reason for not holding it good in all cases.

Objection is made to the second instruction given upon request of the plaintiff because it assumes the existence of a controverted fact, namely, that the bridge in question was within the city. The language of the instruction excepted to is as follows: "If the bridge in question, being within

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the city, was defective," etc. We do not regard the instruction as assuming the fact stated. The sentence is hypothetical not only in subject and predicate, but in its subordinate or qualifying clauses as well. See *Morgan v. Wattles*, 69 Ind. 260. If this were doubtful, it is clear, upon all the instructions given, the jury was not misled in this respect.

Further objection is made to this instruction because of the clause saying that if "this" (the condition of the bridge) "had continued for several days or weeks, then the city will be presumed to have notice such as will bind her in that regard." In answer to an interrogatory, the jury found the fact to be that the bridge had been in the condition it was in at the time the plaintiff was injured for "about two weeks," and, in answer to another interrogatory, it was found that there had been "negligence on the part of the city, or of her street commissioner, at and before the accident, to keep the bridge in repair, when it was discovered to be out of repair." Under any ordinary circumstances, and the evidence discloses nothing extraordinary, the fact of a bridge having been out of repair and in a dangerous condition so long would warrant an inference of knowledge on the part of the officers of the city, or some of them having duties in reference thereto, of the fact. See *Todd v. The City of Troy*, 61 N. Y. 506. If, therefore, not strictly correct, it is manifest that the instruction did the appellant no harm; and, under secs. 101 and 580 of the code, we are forbidden to reverse a case when it appears that the merits of the cause have been fairly tried in the court below. These considerations dispose, too, of the objection made to the first instruction, in reference to the time of the notice to the city. The rule no doubt is, as claimed, that the city "is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known." *Dillon Municipal Corporations*, sec. 790. But from the

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answers to interrogatories, as well as upon the evidence, it is clear that the city had notice in due time to have made repair of the bridge in question.

It is also claimed that the court erred in permitting the plaintiff to make proof concerning his professional earnings before his injury. Summing up on this topic, the counsel for the appellant says :

“In substance, the plaintiff is permitted to prove what his professional earnings had been per year for five years, and how much his business had fallen off during six months succeeding the injury. This was permitted to go to the jury under an allegation in the complaint, that the plaintiff was damaged in his business, and asking a recovery for the same. The damages are for a personal injury. This evidence was admissible in estimating the value of time lost, but not as a basis of damages. Taken in connection with the demand of the complaint and the instruction of the court, the evidence was clearly admitted as a basis of damages. It has been held that similar evidence is competent, not as a basis of damages, but as a guide to the jury, to aid them in the exercise of their discretion.

“The following are the authorities in support of this proposition : *Allison v. Chandler*, 11 Mich. 542 ; *Taylor v. Dustin*, 43 N. H. 493 ; *Simmons v. Brown*, 5 R. I. 299 ; *Wade v. Leroy*, 20 How. 34 ; *Lincoln v. The Saratoga, etc., R. R. Co.*, 23 Wend. 425 ; *The New Jersey Ex. Co. v. Nichols*, 33 N. J. 434 ; *Ballou v. Farnum*, 11 Allen, 73.”

In addition to these cases cited by counsel, see in point *The City of Indianapolis v. Gaston*, 58 Ind. 224 ; *The Town of Elkhart v. Ritter*, 66 Ind. 136.

We have no doubt the testimony was admissible, and, indeed, the proposition of counsel for the appellant concedes as much. It did not furnish the measure of the damages to which the plaintiff was entitled, but the jury had a right to consider it in estimating the compensation to be awarded ;

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and it is evident from the amount of the verdict, that this is the use they made of it. It is enough, however, to meet the exception to its introduction, that the evidence was admissible for any purpose. If the court gave any instruction authorizing a misuse of the evidence, exception should have been saved to the instruction. It has not been pointed out wherein the instructions were wrong in this direction.

We find no available error in the record.

Judgment affirmed, with costs.

DISSENTING OPINION.

ELLIOTT, J.—In my judgment, notice to an individual councilman is not notice to a municipal corporation, unless the councilman was at the time engaged in the business of the municipality.

The importance of the question, considered as an abstract matter of law, as well as the consequences which must necessarily flow from the enforcement of the rule declared in the opinion of the majority, must stand as my apology for a somewhat lengthy statement of the reasons which impel me to refuse assent to the prevailing opinion.

It is necessary, at the outset, to determine the relations which members of the common council sustain to the corporation. Municipal corporations are political organizations instituted for public and governmental purposes. The whole interest is in the public ; neither corporators nor officers have any private interest either in corporate property or corporate affairs. Councilmen are *quasi* public officers, with powers, duties and liabilities very closely resembling those of public officers of the State. *Newman v. Sylvester*, 42 Ind. 106. The common council are the governing legislative officers, and possess, in some degree, the attributes of local legislative sovereignty ; but no body of municipal officers constitutes the corporation, nor do all the officers combined constitute

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the corporation. The inhabitants constitute the body corporate. Mr. Grant says: "The council" are "the ministers or agents of the corporation; but it is to be remarked, that the council are neither *the* corporation, nor are they in themselves *a* corporation." Grant Corp. 357. The same doctrine is declared in *Lowber v. The Mayor, etc.*, 5 Abb. Pr. 325, and *Clarke v. The City of Rochester*, 24 Barb. 446.

The common council are not general agents; on the contrary, they are special agents with limited statutory powers. *Johnson v. The Common Council, etc.*, 16 Ind. 227. Their powers are defined by statute, and the mode of exercise is explicitly prescribed.

It is an elementary principle, that where powers are conferred upon a corporation, public or private, and the mode of exercise is prescribed, the powers conferred must be exercised in the prescribed mode. Our general law for the incorporation of cities does prescribe the mode in which the powers devolved upon the common councils of the cities of the State shall be exercised.

It can not be doubted that our statute requires that all official acts of the common council shall be done by the members when convened in regular or special session. This is, indeed, the general rule, irrespective of express statutory enactments. It must follow from the familiar principles referred to, that the councilmen act for and represent the city only when sitting in lawful session. If it be granted that councilmen represent the municipality only when engaged in the discharge of their duties in the municipal legislature, then it must also be conceded that an individual councilman does not at other times and places act as the agent of the corporation. It seems clear to my mind, that the minor proposition is necessarily bound up and involved in the principal one.

I may be pardoned, I trust, for referring to some considerations which support the proposition, that councilmen are

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agents only when engaged in discharging the functions of their office. Less than a quorum of the council can do no valid act. *The City of Logansport v. Legg*, 20 Ind. 315; *The State v. Wilkesville Township*, 20 Ohio St. 288. A record of proceedings must be kept and signed in the manner provided by statute. *The South School District v. Blakeslee*, 13 Conn. 227; *Denning v. Roome*, 6 Wend. 651; *Moser v. White*, 29 Mich. 59. Their modes of procedure are analogous to and governed by the rules applicable to legislative bodies. Dillon Munic. Corp., sec. 288. Meetings must be held at the lawfully designated times. Powers of the council can not be delegated to individual members. *Whyte v. The Mayor, etc.*, 2 Swan, 364; *Day v. Green*, 4 Cush. 433; *Smith v. Morse*, 2 Cal. 524.

These examples are sufficient to show, although illustrations might be multiplied, that the council as a collective body are the agents, and not individual councilmen at their respective homes and places of business, scattered about the city.

Turning for a moment to the law governing private corporations, we shall find strong confirmation of the general doctrine affirmed in this opinion. One director can not bind the corporation, by admissions or contracts. It requires the vote of a majority of all the directors, in regular and lawful session, to impose binding obligations upon the corporation. *Price v. The Grand Rapids, etc., R. R. Co.*, 13 Ind. 58; *The Brooklyn Gravel Road Co. v. Slaughter*, 33 Ind. 185. A contract made by a majority of directors, at an informal and irregular meeting, imposes no liability upon the corporation. *Barcus v. Hannibal, etc., Co.*, 26 Mo. 102; *Cram v. The Bangor House Proprietary*, 12 Me. 354. Without prolonging this discussion by citation of cases, which, indeed, is not necessary, as the principle is so firmly settled and well known, I affirm that the universal rule is, that the governing officers of a corporation, such as directors and trustees, must, in order to bind

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the corporation, act as a collective body and in regular and lawful session. If this be the rule applicable to corporations, where directors and trustees have direct pecuniary interests, it certainly must be so in cases where officers of municipal corporations are discharging duties for the benefit of the public, and not for the promotion of private interests.

Fundamental principles of the law are the same, whether the corporation whose interests and rights are under discussion is a public or a private one. The general principle, as settled by a long line of decisions, is, that notice to an individual director of a private corporation is not notice to the corporation, unless the director was, at the time, engaged in the transaction of corporate business. Among these cases are: *United States Ins. Co. v. Shriver*, 3 Md. Ch. 381; *Washington Bank v. Lewis*, 22 Pick. 24; *Farmers and Citizens' Bank v. Payne*, 25 Conn. 444; *Farrel Foundry v. Dart*, 26 Conn. 376; *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54; *Fulton Bank v. New York, etc., Co.*, 4 Paige, 127; *Louisiana State Bank v. Senecal*, 13 La. 525; *Powles v. Page*, 3 C. B. 16; *Edwards v. The Grand Junction R. W. Co.*, 1 Myl. & C. 650; *Lancey v. Bryant*, 30 Me. 466; *Soper v. Buffalo, etc., R. R. Co.*, 19 Barb. 310; *Loomis v. Eagle Bank*, 1 Disney, 285; *Pemigewassett Bank v. Rogers*, 18 N. H. 255.

The principle, that notice to a corporate officer is not notice to the corporation, unless the officer was, at the time of the notice, engaged in some corporate business, applies as well to public as to private corporations. There is, indeed, no stronger reason for the rule in cases of public corporations. Private corporations are organized for selfish purposes, and officers are controlled by motives of self-interest; whereas public corporations are organized for governmental purposes, and the officers are vested with public trusts, and are not influenced by pecuniary or personal interest. It would violate all just principles of law and equity, to impose upon

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public corporations a broader responsibility for the acts of their officers than that devolved upon private corporations.

Recurring again to fundamental principles, we find that notice to an agent is sufficient only in cases where the admissions of the agent would bind the principal. This is incontestably so with respect to the officers or agents of private corporations. Dr. Wharton says: "Wherever an officer of a corporation can bind the corporation by his acts, there notice to him will be notice to the corporation." Wharton Agency, etc., sec. 184. Story Agency (8th ed.), sec. 140c. This doctrine logically follows from the cases cited, and is the only one which can be harmonized with settled principles. It is certain that an agent's admissions bind his principal only when made while engaged in transacting the business of the principal. Accepting as correct these fundamental principles, it follows, as an unavoidable logical conclusion, that notice to an individual councilman, not at the time engaged in the performance of an official duty, is not notice to the municipality.

The conclusion just expressed is that reached by one of the soundest lawyers and thinkers of our day. Judge DILLON, speaking of the declarations of municipal officers, says: "To render such declarations and admissions evidence, they must accompany acts, which acts must be of a nature to bind the corporate body." Dillon Municipal Corporations, 3d ed., sec. 237, note 1. The opinion of the eminent author quoted is sustained by many authorities. See authorities cited in note to sec. 237, and in note to sec. 305. There are other cases sustaining the doctrine here maintained. In the case of *Bush v. Trustees of Geneva*, 3 T. & C., N. Y. 409, it was held that notice to two of several town trustees of a defect in a street was not sufficient, and in *Peach v. The City of Utica*, 10 Hun, 477, it was decided that notice to an alderman was not notice to a corporation.

Cases decided by the Supreme Court of Maine are cited

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by the appellee as sustaining the doctrine sanctioned by the majority opinion. These cases go much further; so far, indeed, as to carry their own condemnation upon their faces, for they hold that notice to an inhabitant is notice to the town. It is true that some of these cases speak of "a principal," or "the principal," inhabitants, but this qualification is of little practical force where all inhabitants are, in theory if not in fact, sovereigns and equals. It would be, to say the least, a very hard and ungracious task for a court to undertake to sift the inhabitants of the smallest city, and single out the principal ones. Aside from this, the doctrine, if applied to such cities as New York, Philadelphia, Chicago or Boston, would work the rankest injustice. It would have the same effect even in cities such as Logansport; for it would be inequitable to hold that notice to one, ten or twenty, out of twelve thousand inhabitants, should fasten a burden upon all the other corporators. I know that the majority opinion sanctions no such doctrine, but it does, as it seems to me, depart from settled principles, and when once this is done there is no longer certainty, for we are drifting without guides or restraints, and may at last reach some such erroneous result as that to which the departure from settled principles has carried the courts of our sister State.

The underlying principle of agency is, that the agent derives his authority from the voluntary appointment of the person whom he represents. No one councilman is appointed by the municipality, and, therefore, no one councilman can be deemed the agent of the corporation. All the councilmen are so appointed, because all the councilmen, when assembled in legal session, are the chosen or appointed agents of the whole number of corporators. Individual councilmen are selected by the corporators of particular localities or wards, and it is only when acting in conjunction with councilmen chosen by other wards or localities, that they can be correctly said to be agents of the city. The

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corporators of the municipality ought not to be bound by the acts or omissions of one man, with whose appointment they have nothing at all to do. If the converse of the proposition which this opinion endeavors to sustain be true, then it would follow that a councilman from ward one could bind all the inhabitants, by the receipt of notice of a defect in a street in ward twenty, although ward twenty was five or twenty miles distant from ward one. It would also follow, I suppose, if the converse of the proposition named be correct, that notice to the most dissolute and unworthy member of the common council, elected from a single ward, would impose a burden upon the inhabitants of a score of other wards although they had no part in selecting him. Other considerations might readily be suggested in support of the proposition that the common council, as a collective body, are the agents of the city, and that individual councilmen are not, but this discussion has been already too much prolonged, and I shall neither suggest nor discuss them.

Councilmen are not in the continuous employment of the city. Their powers and duties do not require them to devote all their time to the corporate business. There is not the slightest resemblance between the authority of a councilman and that of a general agent intrusted with the general management of his principal's affairs. Nor is there any similarity between the authority and duty of a councilman and that of such officers as the mayor, street commissioner, treasurer or clerk, who are constantly and uninterruptedly in office for the terms for which they were elected, and whose official duties are regular and continuous. The common council must meet in regular session within ten days after their election. Section 46, general act. They must fix regular times for meetings. Stated meetings must be held twice in each month. A majority of the members constitute a quorum for the transaction of business. Section 47.

Without multiplying citations, it may, as I think, be safely

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affirmed that our statute means that individual councilmen shall be deemed agents of the city only when engaged in some act expressly delegated to them, or when sitting as members of the council convened in lawful session. This conclusion is strengthened by the fact that other officers, such as the mayor, marshal and street commissioner, are continuously in office, charged with ministerial duties ; while those of the councilmen are almost exclusively legislative.

It may be broadly granted that ministerial officers have no right to appropriate the money of the corporation to the repair of streets, and the force of the argument be in no respect impaired. The presumption is, that the municipal legislature has made and placed within the reach of ministerial officers proper appropriations for guarding and protecting dangerous defects. It is not to be presumed that the councilmen have been derelict in this respect ; upon the contrary, the presumption is that they have done their duty in this, as in all other official matters.

Municipal corporations are not, as a general rule, bound to repair or improve ; there is no such absolute duty resting upon them ; but they are bound to make safe dangerous places in the highways. This may be done by placing about the dangerous places barricades or warnings and signals of danger ; there is no imperative duty to rebuild or repair. A ministerial officer may well be charged with the duty of placing about a dangerous place the proper barricades or warnings, but one would hardly ascribe such a duty to a legislator. Notice, to be effective, should be given to the officer charged with the specific ministerial duty and invested with the requisite authority, and not to officers whose duties are never ministerial in the true sense, but always legislative.

The salary or compensation which the statute awards councilmen shows very clearly that it was not intended that they should be general agents, continuously representing the city. The compensation is explicitly limited to an annual salary

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not exceeding one hundred and fifty dollars per annum, and another provision prohibits members of council from directly or indirectly receiving any other compensation. Independently of such a provision, they could not rightfully receive any other compensation than that expressly provided by statute. *Smith v. City of Albany*, 61 N. Y. 444. It will hardly be contended that a man of average business capacity, or ordinary intelligence, could be expected to give all his time and attention to corporate affairs for such a paltry compensation as that prescribed by our statute. If councilmen are not general agents, they can not bind the corporation by admissions, nor will notice to them be effectual as against the municipality. It is well settled that notice to a special agent is not notice to the principal, unless the agent was at the time engaged in conducting the transaction in behalf of his principal. Wharton Evidence, sec. 1,175. Notice to individual councilmen, engaged about their own affairs upon the street, or in the shop, store or home, can not, without doing violence to this settled principle, be deemed notice to the corporation of whose legislative body they are members.

If councilmen are the general agents of the city, charged with the duty of receiving and acting upon notice of defects in public highways, then, for culpable negligence in failing to perform that duty, they are liable to their principal. It can not be assumed that there exists a duty to act upon notice, without also assuming that for a wrongful refusal, or a negligent failure to act, there is a corresponding burden of liability for injury resulting from such wrongful refusal or negligent omission. I can not bring my mind to the conclusion that, for the pitiful compensation provided, the Legislature ever intended there should be any such duty, or any such correlative burden. It can not be successfully asserted that there is such duty, but no burden. It is a vain thing to imagine a duty without a liability, save only in matters of a judicial nature. Let it once be understood that

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councilmen owe such a duty, accompanied by its inseparable burden, and men of character and responsibility will shun the office, and the government of our cities will fall into the hands of the unworthy and irresponsible, reckless alike of duty and liability. The office of councilman should not be incumbered with any such grievous burdens, for it is evidently intended to be one of honor rather than of profit. Possibly, I grant, little of either in most cases.

It seems to me that undue importance is attached to the provision of the statute authorizing five councilmen to call a special meeting. This provision superadds no powers, creates no additional duties. It merely confers authority to call such meetings; for without it there would be no such power. It does not broaden the authority of the agents, nor does it increase their liability. This isolated provision ought not, I submit with all possible deference and respect, to be allowed to overthrow the whole body of the statute and strike down long and firmly settled principles. It was never meant to have any such effect. It was not intended to require individual councilmen to carry into workshop, store, office or home, their representative character. The burden imposed by such a construction would be almost as annoying to the ordinary man of business as was the "Old Man of the Sea" to Sinbad the Sailor.

There is no reason growing out of public policy requiring such a rule as that which the court has adopted. Persons who traverse the streets are well protected. Express notice to the chief executive officer, or to the ministerial officer or agent having direct charge of the streets, is sufficient to charge the municipality. Not only this, but if the defect has existed for such a length of time as that the corporation ought to have taken notice, it will be held to have had notice. Even more than this, corporate authorities are charged with notice of the probability of material, out of which streets, bridges and crossings are constructed, to become unsafe by exposure,

 Bay v. Saulspaugh et al.

and must take measures to guard against injury from such cause. Surely these rules guard sufficiently the rights of persons who travel upon the public highways, and to add other burdens will be to oppress our public corporations, the corporators of which receive no personal interest whatever from the rights and powers conferred by the incorporating act.

Notice to councilmen, granting for argument's sake the correctness of the theory upon which the majority opinion proceeds, must undeniably be reasonable notice. Reasonable notice to a councilman of a defect, and reasonable time for the council as a collective body to act, would, of course, be allowed. If this proposition be correct, then the instruction in this case is palpably erroneous, because it utterly ignores the element of the reasonableness of the notice.

I am not, however, for reversal upon this narrow ground, but upon the broader and more important one stated in the preceding pages.

 No. 7242.

BAY v. SAULSPAUGH ET AL.

74	397
143	70

ASSIGNED DEBT, ACTION ON.—*Debt must be a Tangible and well identified Cause of Action.*—*Sale by Sheriff on Execution.*—*Assignment.*—Sections 438 and 439, 2 R. S. 1876, p. 208, construed together, mean that the debt, or thing in action, which may be given up by an execution defendant and levied upon and sold by the sheriff and assigned and delivered by him, must be some tangible and well identified cause of action, upon which suit may be brought by the purchaser in the same manner as might have been done by the execution defendant, and capable of being assigned and delivered to the purchaser, such as a paper writing signed by some third person, a duly itemized account, or other chose in action described upon or by some paper.

SAME.—*Complaint.*—*Insufficient Description of Claim.*—*Account.*—A complaint upon an assigned debt for “about eight hundred dollars,” which gives no bill of particulars of the claim, or itemized statement or description of the account, or of the nature of the demand, is insufficient.

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SAME.—Plaintiff's inability to obtain a better description or identification of the demand is a misfortune, for which averments that the execution defendant and all the defendants refuse to give him an itemized statement or bill of particulars, although often requested so to do, suggest no adequate remedy.

SAME.—*Sheriff's Assignment.*—The sheriff's assignment of a debt, or thing in action, sold on execution, is not the foundation of an action brought upon the claim and does not become a part of the complaint by being filed with it, and the facts recited therein can not be considered in aid of the averments of the complaint.

From the Jennings Circuit Court.

D. Overmyer, for appellant.

NIBLACK, J.—Complaint by David Bay against Thomas Saulspaugh, Elisha P. Reynolds, John Crabraugh and William B. Sheets, alleging that for three years then last past the defendants had been doing business under the firm name of Reynolds, Saulspaugh & Co., and that, on the 15th day of July, 1876, the plaintiff had purchased, at sheriff's sale, from the sheriff of Jennings county, a certain account or claim of one John Droitceur against the defendants, for the sum of eight hundred dollars, more or less; that said claim was sold to him as an existing debt against the defendants, in their firm name of Reynolds, Saulspaugh & Co., a certificate of which sale, issued by the sheriff, was filed with the complaint; that the defendants, by reason of the facts stated, were indebted to him in the sum of eight hundred dollars; that no bill of particulars of said claim or account was filed with the complaint, because said Droitceur and the defendants all refuse to give the plaintiff any itemized statement or bill of particulars of the same, although often requested so to do; that said Droitceur voluntarily surrendered and gave up said claim to the sheriff, representing that the same was about eight hundred dollars, and all right, and that he could not give the items thereof, because the book in which the account was kept was not then accessible to him, but promising to give such items at his earliest con-

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venience. Wherefore said claim was levied upon as amounting to eight hundred dollars, more or less. Droitceur was made a defendant, to answer as to his interest in the account.

A demurrer for want of sufficient facts was sustained to the complaint, and, the plaintiff refusing to plead further, final judgment upon demurrer was rendered for the defendants.

Section 438 of the code, 2 R. S. 1876, p. 208, provides that "Any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property." The succeeding section further provides that "The sheriff making the sale of any such debt, or thing in action, shall assign and deliver the same to the purchaser, and the assignment shall have the same effect as if made by the execution defendant at the time of making the levy thereon, and shall be treated as so made."

We think these two sections, when construed together, must be taken to mean that the debt or thing in action, which may be given up by an execution defendant, and levied upon and sold by the sheriff, and afterward assigned and delivered by him, must be some tangible and well identified cause of action, upon which suit may be brought by the purchaser in the same manner as might have been done by the execution defendant, and capable of being assigned and delivered to the purchaser, such as a paper writing signed by some third person, a duly itemized account, or other chose in action, described upon or by some paper.

The complaint in this case appears to us to have been fatally defective, for want of a sufficient description or identification of the claim purchased by the appellant, as well as the nature of the demand preferred by him against the appellees. His inability to obtain a better description or identification was a misfortune, for which the averments of the complaint suggest no adequate remedy.

The assignment of the sheriff to the appellant was not the

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foundation of this action, and hence it did not become a part of the complaint by being filed with it. The demurrer to the complaint, therefore, raised no question upon the assignment in the court below, and the facts recited in the assignment can not be considered by us here, in aid of the averments of the complaint. *Ragsdale v. Parrish*, ante, p. 191; *Parsons v. Milford*, 67 Ind. 489.

Whether other objections might not be urged against the complaint is a question we have not considered.

The judgment is affirmed, with costs.

No. 9371.

GODDARD ET AL. v. STOCKMAN, TREASURER, ET AL.

COUNTY COMMISSIONERS.—*Record.—Finding.—Petition for Appropriation to Railroad.—Election.—Interpolation of Record.*—The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to vote aid for the construction of a railroad, “And proof being made that twenty-five of the petitioners are freeholders of Clinton township,” is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated.

SAME.—*Signing Record of Proceedings.—Unsigned Orders not void.*—While it is the better practice that the record of the proceedings of a board of county commissioners should be signed by the members thereof, yet unsigned orders of the board are not void, and, when properly signed within a reasonable time, become valid from the time when made.

SAME.—*Conditions to Appropriation.—Statute Construed.*—A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation. The act of March 8th, 1879, Acts 1879, p. 46, enables petitioners and voters to annex conditions to appropriations, but does not compel them to do so if they do not desire any conditions.

74	400
135	374

74	400
137	228

74	400
155	490
155	492
155	493
155	496

74	400
163	482
163	489
163	490

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SAME.—*Contesting Validity of Election.*—*Appeal from Order of Board.*—*Injunction.*—While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and enquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof.

SAME.—*Levy of Less than one-half of Donation.*—*Appeal.*—If, in such case, the one per cent. levied for the current year amounted to less than one-half of the amount of the donation asked, the remedy therefor is by appeal from the order whereby the levy was made.

SAME.—*Granting Prayer of Petitioners.*—*Sufficiency of Order.*—The recital in the record of the order of the board of commissioners making such an appropriation, that "it is hereby ordered that a special tax of one per cent. * * be and the same is hereby levied, * * for the purpose of raising one-half of the amount specified in said petition," is a sufficient granting of the prayer of the petition.

SAME.—*Property Omitted from Taxation Does not render Tax on other Property invalid.*—If, in making the levy for such donation, certain taxable property of the township was omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid.

PRACTICE.—*Pleading.*—*Demurrer.*—If an allegation of a pleading is one that the pleader can be heard to make, and it be well pleaded, then a demurrer admits it to be true, otherwise it does not.

From the Decatur Circuit Court.

J. D. Miller and F. E. Gavin, for appellants.

W. A. Moore, — *Bennett, C. Ewing, J. K. Ewing, C. Baker, O. B. Hord and A. W. Hendricks*, for appellees.

WOODS, J.—The appellants, who were plaintiffs in the circuit court, sued as taxpayers of Clinton township, Decatur county, to enjoin the collection of a tax levied for the purpose of aiding the Vernon, Greensburg and Rushville Railroad Company, by subscribing, on the part of the township, to \$11,000 of its capital stock.

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A demurrer to the complaint was sustained by the circuit court, and final judgment was rendered upon it in favor of defendants.

The substance of the complaint is as follows: That plaintiffs were taxpayers of the township; that on the 19th of July, 1879, a petition, purporting to be signed by twenty-five or more freeholders of the township, was filed in the county auditor's office, asking the county commissioners to make the appropriation; a copy of the petition is set out; that on the 21st of July it was presented to the commissioners, who ordered it spread upon the records, and thereupon made an order in the premises, which is set out in the complaint. It recited that proof was made that twenty-five of the petitioners were freeholders of the township. It directed the holding of an election on the 25th day of August, 1879, and that the auditor should give notice of the election.

The complaint states that that part of the order reciting that proof was made that twenty-five of the petitioners were freeholders of the township is an interpolation made subsequently, but does not state by whom made; that the record entry of the order was not signed by the commissioners or any of them, nor attested by the auditor, until thirty days after the date it purports to have been signed; that no proof was made that the petition had been signed by twenty-five freeholders, and that it had not, in fact, been so signed; that the auditor gave notice of the election, a copy of which is set out; the certificates of the sheriff as to posting and publishing the notice are set out; that on the 25th day of August, 1879, a pretended election was had in Clinton and Washington townships, there having been a like petition from the latter township; that the officers of election of the two townships met on the 28th of August, at the courthouse, as a pretended canvassing board, and canvassed the vote of Clinton township, and certified the result to the auditor—67 for and 66 against the appropriation; their cer-

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tificate is set out; that on June 10th, 1880, the commissioners, in regular session, ordered a levy of one per cent. on the taxables of Clinton township; the order is set out; that the tax has gone on the duplicate, and the treasurer is about to enforce collection; that the taxables of the township on the duplicate of 1878 amounted to \$550,000, and for 1880 to \$492,000 only.

The complaint then assigns twelve objections to the validity of the tax, mostly matters of law. One of them, however, the eighth, states as fact that ten persons who voted for the appropriation were not residents or legal voters of the township, so that upon the legitimate vote there was a majority of nine against the measure.

The first objection assigned is that the board had no right or authority to consider the petition nor to order the election or levy the tax.

The fourth objection is, that the board, prior to ordering the election, were not satisfied that the petition had been signed by twenty-five freeholders, and that the petition was not in fact so signed.

In appellants' brief these two objections are treated as raising the same point, and are considered together.

The order of the county board recites as follows: "And proof being made that twenty-five of the petitioners are freeholders of Clinton township."

It is said that this means nothing more than that some evidence to that point was introduced, but that it does not show that the board "was satisfied with the proof." It is also said that the recital does not show that the "Clinton township" referred to in the recital, was in Decatur county. When a tribunal having jurisdiction to decide as to the existence of a fact finds that it is *proved*, there would seem little room for doubt as to its being satisfied that the fact existed. When the commissioners of Decatur county, in considering a petition purporting to be signed by freehold-

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ers "of Clinton township, in said county," find that the petitioners were freeholders of "Clinton township," there is little room to doubt that they referred to Clinton township in their own county.

But it is said that the recital referred to was an interpolation, made subsequently to the making of the other portions of the entry.

The complaint copies the order of the commissioners, and this recital appears as a part of it. It was placed there presumably by the auditor, with the sanction of the board—at least nothing to the contrary is alleged. The only complaint made is, that it was written after the other portion of the entry, and after the day upon which the order was made. It is not even charged that it was placed there fraudulently, or by an unauthorized person.

The mere fact, that the words were interpolated after the other part of the entry had been completed, in no manner affects the validity of the entry, or of the interpolated part. See *Larr v. The State, ex rel.*, 45 Ind. 364; *Anderson v. Mitchell*, 58 Ind. 592; *Blair v. Lanning*, 61 Ind. 499; *Jones v. Carnahan*, 63 Ind. 229; *Kent v. Fullenlove*, 38 Ind. 522.

No statute has been called to our attention or come under our observation, which requires that the proceedings of the board be signed by the members of the board, though it is doubtless the common usage, and the better practice, that the proceedings be so signed and authenticated. The auditor of the county is required to "attend the meetings of such commissioners, and keep a record of their proceedings," and "The commissioners of each county shall use a common seal; and copies of their proceedings, when signed and sealed by the said auditor, shall be sufficient evidence thereof, on the trial of any cause in any of the courts of this State." 1 R. S. 1876, p. 351, secs. 7 and 10. But, conceding the propriety and necessity of the signatures of the commissioners, we are clear that unsigned orders of the board are not void, and

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when properly signed, within any reasonable time, become valid from the time when made. See authorities cited *supra*.

The next objection is, "Because the petition presented to the board of commissioners of said county does not ask that Clinton township make the appropriation of \$11,000, but that the commissioners make the same."

The petitioners represent themselves as freeholders of Clinton township. The petition represents that the road runs through that township, and asks that the "board make an appropriation of eleven thousand dollars for the purpose of aiding in the construction of said road, by taking stock in said company, for said Clinton township."

The next objection is founded on the fact that the petition did not ask for the annexing of any conditions to the appropriation.

This court had decided, in *The Indiana, etc., R. W. Co. v. The City of Attica*, 56 Ind. 476, that it was not competent for a city to annex conditions to a donation as a consideration for making it. This was at the May term, 1877. At the next session of the Legislature, the act of March 8th, 1879, Acts 1879, p. 46, was passed, the purpose of which was to permit townships to aid railroad companies, either by taking stock or donating money, by annexing such conditions "as to freight, rates, location of machine-shops, depots, and such other terms and conditions as may be specified in such petition," etc. The obvious purpose of this act simply was to enable the petitioners and voters to annex conditions to the appropriation, if they saw fit to do so, and not to compel them to do so if they did not desire any conditions.

The fifth objection is, that the election "was held within less than thirty days after the making *and signing* of the order directing the same."

This proceeds on the assumption, already discussed, that the order for holding an election is without efficacy and void, until entered and signed by the commissioners. If the stat-

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ute provided that the day to be named for the election should be not less than thirty nor more than sixty days from the making and signing of the order, the case would probably fall within the principle ruled in *Kent v. Fullenlove*, 38 Ind. 522. But that is not the provision. The statute directs that the board shall "order the polls * * to be opened, on a day to be named in the order, which shall not be less than thirty nor more than sixty days thereafter," etc. Acts 1869, p. 93.

The sixth objection is not essentially different from the fifth, and need not be further considered.

The seventh and eighth objections are based upon the allegation that, of the sixty-seven votes cast and counted in favor of the appropriation, ten were cast by persons who were not legal voters, and that, of the votes legally cast, there was, in fact, a majority against the appropriation.

It is said by counsel, that the demurrer admits this allegation to be true. But this takes for granted the question in dispute. If the allegation is one that the plaintiffs can be heard to make, and if it is well pleaded, then the demurrer admits it to be true. Otherwise it does not.

In this matter the county commissioners were performing a delegated governmental duty; for the maintenance of highways is one of the duties of government, and a railroad is recognized as a modern species of highway.

There is obvious necessity that the will of the people in the matter of aiding the construction of a railroad, as expressed at the polls, should in some way be authoritatively ascertained once for all. If left open to every taxpayer, in a suit brought at his own pleasure, to go behind the returns of the officers of election and the determination of the county board, a measure supposed to be of public importance can not be securely accomplished. At the suit of one citizen to enjoin the tax and "remove a cloud from his title," a jury might find one way, while another jury in another suit might find the other way. As was said in *Shideler v. Clinton*

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Township, 23 Ind. 479, "In such a case, public safety required that the determination shall be conclusive."

For the purpose of definitely and finally ascertaining the result, the Legislature has provided that the machinery of a general election shall be employed. Secs. 4 to 11 of the railroad act, 1 R. S. 1876, p. 736. In this case there was not only an official return of the vote by the sworn officers of election, but the county board made a finding that the majority of the voters at the election were in favor of the appropriation.

Against these views the counsel for the appellant say: "It has, however, never been the duty of any court or tribunal to pass upon the legality of these votes. When the ten illegal voters offered to vote, all the board of judges could do was to require the oath and affidavit required by sec. 21, 1 R. S. 1876, p. 439, and then, by sec. 22, they must receive the vote. They acted in a ministerial and not in a judicial capacity. When the board of canvassers met and organized, all they could do was, as commanded by statute, sec. 10, 1 R. S. 1876, p. 738, to 'carefully compare and examine the papers, and shall prepare and sign a statement of the whole number of votes cast, and the number for such appropriation to the railroad company and the number against it.' No power to hear evidence or purge the polls is given them. The statute further provides (sec. 11) that this statement shall be filed with the auditor, and recorded, and by sec. 12, that, 'If a majority of the votes cast shall be in favor of such railroad appropriation, the board of county commissioners, at their ensuing regular June session, shall grant the prayer of said petition.' There is no provision made for any trial, any adversary proceedings or the hearing of any evidence, other than the statement filed by the board of canvassers with the auditor."

If convinced of the truth of these views, and that the appellants have never had any legal means of contesting the

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election, or the return thereof made by the canvassers, we should feel compelled to sustain the appeal and to hold that a remedy could be had by injunction. But we entertain a different view of the law. The statute expressly gives to any person aggrieved by any decision of the board of county commissioners a right of appeal therefrom to the circuit court. This right is not confined to the formal parties to the procedure, but any one, not a party, may show his interest by affidavit and have the appeal. The law for contesting elections is not applicable to elections such as this was, but, nevertheless, there was a practicable way open for making an efficient contest. The law is not, that, if a majority of votes returned be in favor of the appropriation, the board shall grant the prayer of the petition, but, if a majority of the votes cast shall be in favor of such railroad appropriation, the county commissioners, at their regular ensuing June session, shall grant the petition. This means the legal votes cast, and the board has the right to go behind the canvass of the vote and inquire into the truth of the return made; and any individual interested may appear before them and contest the result of the election, and, if aggrieved at the decision of the board, take his appeal to the circuit court. See *Muncey v. Joest*, *post*, p. 409; *McKeever v. Ball*, 71 Ind. 398; *Houk v. Barthold*, 73 Ind. 21; *Brokaw v. The Board, etc.*, 73 Ind. 543, and cases cited.

The ninth objection is to the effect that the one per cent. levied for the year 1880 amounted to less than one-half of the amount of the donation. The remedy for this wrong, if it was a wrong, was also by an appeal from the order whereby the levy was made.

The next objection rests on the fact that a similar election was held in another township where there were two precincts, and the judges of all three precincts united in canvassing and certifying the vote of each precinct. The

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question thus presented has been already decided by this court. *Mustard v. Hoppess*, 69 Ind. 324.

The next objection to the levy is the alleged fact that the board never expressly granted the prayer of the petition for the appropriation. The board did, after making some recitals, say: "Wherefore it is hereby ordered that a special tax of one per cent. upon the real and personal property of said township be, and the same is hereby, levied for the year 1880, for the purpose of raising one-half of the amount specified in said petition." And we think this was a sufficient granting of the petition.

The last objection is, that \$10,000 or over of the taxable property of the township was omitted from this assessment.

It is not shown why or how or by whose fault this property was not taxed, and the argument seems to be that, if through any cause any taxable property is overlooked, the tax upon all other property that has been assessed should be enjoined. We do not understand the law to be so. The assessment act provides for the taxation of all such omitted property. Such an omission bears no analogy to the case of a turnpike professing to assess all lands within a mile and a half of the line, but omitting portions of the land within that limit.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

No. 9164.

MUNCEY v. JOEST, TREASURER, ET AL.

DITCHES AND DRAINS.—*Notice.*—Under section 2 of the act of March 9th, 1875, p. 97. notice of the pendency of a petition to establish a ditch must be published for four consecutive weeks, and notice published for one day less than that time is irregular and voidable.

74	409
130	412
130	518
74	409
136	213
136	490
74	409
138	139
74	409
142	405
74	409
149	120
152	95
152	97
74	409
154	241
74	409
166	656
74	409
171	266

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SAME.—Finding of Commissioners.—Collateral Attack.—Whether there was or was not sufficient notice, is a jurisdictional question to be determined by the commissioners, and their finding can not be collaterally attacked, unless the record affirmatively shows that no notice whatever was given.

SAME.—Injunction.—Estoppel.—One who stands by and sees the construction of a ditch without objecting, is estopped from afterward suing out an injunction on the ground that proper notice of the letting of the contract was not given.

SAME.—Breach of Contract.—The mere fact that a contract has not been performed according to its terms is not ground for an injunction.

SAME.—Bond of Contractor.—Surety.—An engineer of a ditch may become surety on the bond of the contractor, as such surety does not thereby become interested in the contract within the meaning of section 12 of the act, *supra*.

From the Posey Circuit Court.

M. W. Pearse, E. M. Spencer and W. Loudon, for appellant.

A. P. Hovey and G. V. Menzies, for appellees.

ELLIOTT, J.—The appellant was the plaintiff below, and by his complaint sought an injunction restraining the collection of a ditching assessment levied upon land of which he was the owner. A demurrer was sustained to the complaint, and final judgment entered against appellant, from which he prosecutes this appeal.

The complaint states as causes, upon which appellant grounds his right to an injunction, these four:

1st. That publication of notice of the pendency of the petition for the ditch was not made for four weeks, as required by statute.

2d. That appellant had no notice of the letting of the contract for the construction of the ditch; that the only notice of the letting of the contract was by posting up one notice at the court-house, and that the contract was let at a price fifty per cent. greater than the fair and reasonable value of such work.

3d. That the contractor to whom the work was awarded did not construct the ditch as laid out and established.

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4th. That the engineer of the ditch was accepted as surety upon the bond of the contractor.

Of these alleged causes in their order :

First. It affirmatively appears from the complaint that the notice was published for twenty-seven days, one day less than the time required by the statute. The act of 1875 requires that notice of the pendency of the petition shall be published for four consecutive weeks, and appellant is correct in his contention that the notice is defective, although lacking only one day of the prescribed time. It is undoubtedly true that, where the statute commands that notice shall be given for a definite time, a notice published for a shorter period is defective, although it fall very little short of the time designated. The difficulty in the case in hand is not in determining whether the notice was such as the statute requires, that is plain enough, but the difficulty is in determining whether the defect in the notice rendered the whole proceedings void. If they were void they are vulnerable upon a collateral attack ; if not void, but merely irregular or erroneous, then they can not be overthrown by such an attack.

The difficult question is : Did the defect in the notice render the proceedings void ? The board of commissioners had jurisdiction of the subject-matter, and there was some notice, but not such a notice as the statute requires. It is important to keep in mind the fact that there was some notice, although a defective one. It will not do to assume that there was no notice at all, for the reverse is true. It is also true that the commissioners had authority to determine whether they had acquired jurisdiction ; this we think would be so independently of any express statutory provision, but there is here an express provision requiring the commissioners to determine all preliminary questions. Section 4 of the act provides that "Said board of commissioners, at the time set for the hearing of said petition, shall, if they find the provisions of the second section of this act to have

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been complied with, proceed to hear said petition." The 2d section contains, among others, provision as to what notice shall be given, and the board must, therefore, in all cases, determine whether the requirement of the statute, concerning notice, had been complied with before entering upon the hearing of the petition. All questions respecting the sufficiency of the notice are thus expressly submitted to the judgment and decision of the board. Whether there was or was not notice, was, of course, a jurisdictional question, and this question having been considered and determined by the commissioners' court, that decision can not be subjected to review and overthrow by a collateral attack, such as the present. *The Board, etc., v. Hall*, 70 Ind. 469; *Brokaw v. The Board, etc.*, 73 Ind. 543.

The complaint affirmatively shows that notice was published, but not for the full time required by statute. There was, therefore, a jurisdictional question presented for decision, and upon it a decision was made. There is a clear distinction between cases in which there is no notice whatever, and those in which there is merely a defective or irregular notice. The general rule upon this subject, deducible from the authorities, may be thus stated: If there is no notice whatever, and this affirmatively appears upon the face of the proceedings, the judgment will be void, and may be overthrown by a collateral attack. If a court, having jurisdiction of the subject-matter, and required to determine all jurisdictional questions, either expressly or impliedly, adjudges that notice was given, its decision will repel a collateral attack, unless the record of the court affirmatively shows that no notice was given; and this is so although the record shows a defective and irregular notice. *Isaacs v. Price*, 2 Dillon C. C. 347; *Harrington v. Wofford*, 46 Miss. 31; *Ballinger v. Tarbell*, 16 Iowa, 491; *Cooper v. Sunderland*, 3 Iowa, 114; *Thompson v. Tolmie*, 2 Pet. 157. We are now speaking of adversary proceedings, and not of *ex parte*

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proceedings, such as were those in the cases cited by the appellant, of *English v. Smock*, 34 Ind. 115, and *Green v. Beeson*, 31 Ind. 7. In the case under examination, adversary proceedings are contemplated, and a right of appeal is given to any person aggrieved by the proceedings of the commissioners. *Houk v. Barthold*, 73 Ind. 21.

Second. The second cause upon which appellant bases his right to an injunction would be a sufficient one if urged by a person who had not estopped himself by his silence. If the appellant had made the proper resistance to the prosecution of the work, and made it without delay, he would have been entitled to relief. The statute does require that public notice shall be given of the time appointed for receiving bids for the construction of ditches. The evident intention of the statute is, that notice shall be given in such a manner as that competitive bids may be invited and received. The provision is necessary for the protection of those who are compelled to bear the burden of the expense entailed upon them by the construction of the ditch. As the statute is silent as to the manner in which notice shall be given, it must be held that reasonable notice is required. We think that posting up one notice at the court-house was not sufficient, but that notices should have been posted in the vicinity of the ditch. The provision of the statute as to the posting of other notices indicates very clearly that the Legislature intended that a reasonable number of notices should be posted in the neighborhood through which the ditch runs. As the appellant made no objection until after the work had been fully completed, he is not now in a situation to complain of the insufficiency of the notice of the letting of the contract. Having received the full benefit of the work done by the contractor, he can not now escape payment upon the ground that proper notice of the letting of the contract was not given.

It is a well settled rule of equity, that if a party is guilty

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of laches or unreasonable delay in the enforcement of his rights, he thereby forfeits his claim to equitable relief. The rule is more especially applicable to cases where a party, being cognizant of his rights, does not take those steps to arrest them, which are open to him, but lies by and suffers other parties to incur expenses and enter into engagements and contracts of a burdensome character. This doctrine has been adopted and enforced by this court. *The City of Evansville v. Pfisterer*, 34 Ind. 36; *The City of Lafayette v. Fowler*, 34 Ind. 140; *Hellenkamp v. The City of Lafayette*, 30 Ind. 192. It has also been declared by many other courts. *Kellogg v. Ely*, 15 Ohio St. 64; *Jackson v. Detroit*, 10 Mich. 248; *City of New Haven v. Fair Haven, etc., R. R. Co.*, 38 Conn. 422; S. C., 9 Am. R. 399; *Wiggin v. Mayor, etc.*, 9 Paige Ch. 16; *Dows v. The City of Chicago*, 11 Wal. 118; *Rochdale Co. v. King*, 16 Beav. 630.

Third. The third cause relied upon by the appellant is not one entitling him to an injunction. As a general rule, the question, whether work has or has not been done in accordance with a contract, is not a proper question for trial in injunction proceedings in any case, and it certainly is not in this. By section 12 of the ditching law, the duty of determining whether the ditch has been constructed according to contract is expressly devolved upon the board of commissioners. It is well settled that, where a matter is submitted to an inferior tribunal for decision, courts can not, in actions for injunction, usurp the functions of such tribunal, nor can the judgment of such tribunal be collaterally impeached upon the sole ground that there was a failure in the performance of a contract.

Fourth. The remaining cause for injunction, appellant claims, is supported by the provision of the ditching law which reads as follows: "No person, having an official duty to perform about said ditch, shall be interested directly or

 Ex Parte Ford, Prosecuting Attorney.

indirectly in any contract for the construction of such proposed ditch or work. And any contract, in which any of said officers shall be interested, shall be deemed fraudulent and void."

This provision refers to the contract for the performance of the work of constructing the ditch, and not to collateral contracts, such as the bond in which the engineer became surety. The bond was merely a security for the performance of the contract, and was not a contract for the work. The only interest which the surety on the bond can have is, that the work shall be done in strict accordance with the terms of the contract, for if it is so done no liability accrues against him; whereas, if it is not properly done, he may be liable. The surety on the bond given to secure the faithful performance of the contract is not interested in the contract within the meaning of the statute.

Judgment affirmed, with costs.

 No. 9067.

EX PARTE FORD, PROSECUTING ATTORNEY.

74	415
149	165

PROSECUTING ATTORNEY.—*Fees on Forfeited Recognizances.*—*Statute Construed.*—*Fees and Salaries.*—Upon an application to the circuit judge, under section 36, acts 1870, p. 142, for a construction of section 23½ of the act in relation to fees and salaries, 1 R. S. 1876, p. 475, on appeal, *Held*, that a prosecuting attorney is not entitled to the percentage therein provided, on money paid to him on a forfeited recognizance before final judgment thereon. Such percentage is allowed only on money collected on final judgment, in actions prosecuted by him on such recognizances.

From the St. Joseph Circuit Court.

G. Ford, for appellant.

WORDEN, J.—The following petition was filed in the court below :

Ex Parte Ford, Prosecuting Attorney.

“STATE OF INDIANA, } St. Joseph Circuit Court,
ST. JOSEPH COUNTY. } October Term, 1880.

“Application of George Ford, Prosecuting Attorney, for construction of statute.

“Said prosecuting attorney, by virtue of acts 1879, Special Session, page 142, section 36, now brings before the court, for construction, section 23 ½ of the act of 1875, 1 R. S. 1876, p. 475, which provides that the prosecuting attorney's fees shall be as follows: ‘Docket fee upon forfeited recognizance ten dollars. And when he prosecutes to final judgment against the defendant, ten (10) per cent. on money collected.’

“Said prosecuting attorney says that at the March term, 1880, of said court, a judgment of forfeiture was rendered against one Jesse W. Jennings as principal, and William Miller and Robert Harris as his sureties, on a certain recognizance, for the sum of two thousand and five hundred dollars, before that time entered into by said parties, conditioned for the appearance of said Jesse W. Jennings on the first day of the March term, 1880, of said court, to answer a charge of arson there pending against him by indictment, and to abide the judgment of said court; that afterwards, to wit, on the 17th day of April, 1880, said Jennings, by his agent, Jesse W. Jennings, Jr., paid to said prosecuting attorney, on said recognizance, the sum of one thousand dollars; that afterwards, to wit, on the 19th day of April, 1880, a complaint on said recognizance was filed in said court against said Jennings and his sureties therein, and that, at the May term, 1880, of said court, to wit, on June 1st, 1880, judgment was rendered against them for fifteen hundred dollars, the residue thereof remaining unpaid, and which still remains unpaid.

“Said prosecuting attorney now desires the court to construe said statute, and to decide whether he is entitled to retain, of the one thousand dollars collected on said recogni-

 Ex Parte Ford, Prosecuting Attorney.

zance the sum of one hundred dollars, or ten per cent. thereof, as a fee for making such collection.”

The court, upon consideration of the question presented by the petition, decided that the prosecuting attorney was not entitled to a fee of ten per cent. on any sum that might be paid to him on any forfeited recognizance before judgment thereon.

The prosecuting attorney excepted to the decision of the court, and, by assignment of error, has presented the question involved for decision here.

The petition seems to have been authorized by the section of the statute referred to in it, which provides that “Any officer being in doubt of the proper charge to be made for any service rendered, shall in no case charge any constructive fee; but he shall bring the question before the circuit judge of his county, in writing, and said judge shall decide the same, which decision shall be entered of record, as other orders of court are entered. A note thereof, showing the page of the order book, shall be entered in the list of fees kept in the office of such officer, which order shall authorize such charge to be made as found by the court. For such submission, proceedings and orders the officer shall make no charge, and shall have no fees therefor.”

The provision of the statute sought to be construed, 1 R. S. 1876, p. 475, sec. 23½, is as follows:

“The circuit and criminal circuit prosecuting attorney’s fees shall be as follows, to wit: * * * Docket fee upon forfeited recognizance - - - - - \$10.00

“And when he prosecutes to final judgment against the defendant ten (10) per cent. on money collected.”

We are of opinion that the last clause above quoted means, and should be construed as if it had read as follows: “And when he prosecutes to final judgment against the defendant ten per cent. on money collected on such final judgment.”

Taylor v. Lohman.

It follows that the prosecuting attorney was not entitled to the percentage on the thousand dollars collected by him, before final judgment on the forfeited recognizance, and that the decision of the court below was right.

The judgment of the court below is affirmed, with costs.

No. 7672.

TAYLOR v. LOHMAN.

PRACTICE.—Evidence.—Supreme Court.—Where there is no conflicting testimony shown by the record, on appeal, the Supreme Court will weigh the evidence and give it such effect as in its judgment should have been given by the trial court.

PROMISSORY NOTE.—Principal and Surety.—Release.—Payment.—Re-loan.—Fraud.—In an action upon a promissory note, against the principals and the surety, the evidence showed that in the presence of one of the makers of the note and of the payee, the surety gave notice that he would not remain longer as surety thereon; that the maker then said to the payee, "If you will let our firm have the money on our own note we will take it, otherwise we will pay you off." To which the payee replied: "I don't want the money. I will take Taylor's" (the surety) "name off the note. I will bring down the note and fix the matter up, and either get new notes or take the money." But no new note was executed, and for several years thereafter the makers paid interest on the note, of which facts the surety was ignorant, and after their insolvency this suit was instituted.

Held, that the transaction amounted to a payment of the note and a re-loan of the money to the makers, and that the surety was thereby discharged from any liability thereon.

Held, also, that keeping a surety so long in ignorance that the note had not been paid, or exchanged for the note of the principals, had all the effect of a fraudulent concealment of the facts, whether so intended or not.

From the Jefferson Circuit Court.

C. E. Walker and *W. S. Roberts*, for appellant.

C. A. Korbly, for appellee.

Taylor v. Lohman.

NEWCOMB, C.—Lohman sued John Pattie, John A. Pattie and Thomas R. Smith, formerly partners as Pattie, Smith & Co., and the appellant, upon a promissory note, on which Pattie, Smith & Co. were the principals and the appellant was surety. The makers were defaulted. Taylor answered, and the issues raised by his pleadings were submitted to the court for trial, which found for the plaintiff. Taylor moved for a new trial, and for cause alleged that the finding was contrary to law; that it was contrary to the evidence, and that it was not supported by the evidence. The motion was overruled, and judgment entered on the finding. The question before us is, did the court err in overruling the motion for a new trial? The case comes here on the evidence solely. This is brief, and as it discloses the nature of the defence pleaded, and is necessary to an understanding of the question involved, we state it. The defendant first introduced the note in suit, which was dated February 11th, 1870, payable twelve months after date, with ten per cent. interest. Credits of the interest accrued up to July 30th, 1876, and payments of \$100 March 22d, 1873, and \$200 May 17th, 1877, were endorsed upon the note. The remaining evidence is thus given in the bill of exceptions: “John Taylor, defendant, on his own behalf, testified as follows, to wit: Was first shown the note sued on, and says it is his signature; that he signed it as security for Pattie, Smith & Co.; that the note was executed by Pattie, Smith & Co. some weeks before he signed it; that there were two notes signed by him. Mr. Lohman had the note sued on in his possession at the time I signed it. The two notes amounted to eight hundred dollars, and were both signed at the same time. From four to six months after the notes were due, I asked Mr. Lohman, in the city, if the notes had been paid. He said, ‘No.’ I then told him to go and see Mr. Pattie and have them settled up. A week later I came down to town and called at Pattie’s office, but did not see Lohman at that time. Two

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weeks later I saw Mr. Lohman go into Pattie's office, and I thought it would be a good time to get them both together, and I followed him into Pattie's office and told him I wanted my name off the notes. Lohman and Pattie were both in there together. I told Lohman I was settling up my affairs, and that I wanted my name off the notes; that I was not willing to stand any longer. Then Pattie said to Lohman: 'If Taylor wants his name off the notes, and you won't take the note of the firm without any individual security, then bring down the notes and I will pay them off.' Mr. Lohman then agreed to bring down the notes and take a new note, and I was to be released. He said he hadn't got them with him that day, they were up on the hill at his house, and he agreed to bring them down and get Pattie's new notes, and I was to be released. I never heard from Lohman, nor Pattie, Smith & Co. again until after Pattie failed. I knew nothing about the fact that Lohman had not fulfilled his agreement. I supposed all the time that the notes were paid or a new one given.

"Cross-examined.—'I never gave any written notice to Lohman to sue.'"

John Pattie testified: "I heard Taylor's testimony about the conversation. Mr. Taylor wanted his name off the notes. I told Lohman I would not give any other security. If he would let us, Pattie, Smith & Co., have the money on our own note, we would keep it; otherwise, would pay him off. He said he did not want the money; he would take Taylor's name off the notes. He did not have the notes with him. He said he would bring down the notes and fix the matter up—get new notes or take the money. We had the money in bank to pay the notes."

"It was admitted by plaintiff that Pattie, Smith & Co. have become insolvent, and are insolvent. One of the notes was paid by Pattie, Smith & Co."

And this was all the evidence.

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Uncontradicted, as it was, did it disclose a defence to the note as to the surety? We think it did. The agreement of Lohman to reloan the money to Pattie, Smith & Co. on their own note, or to take the money due and surrender the note on which Taylor was surety, was calculated, in the language of the authorities, to lull him into security, and prevent him from obtaining his indemnity. 2 Parsons Notes and Bills, 502; *Roberts v. Miles*, 12 Mich. 297; *Harris v. Brooks*, 21 Pick. 195; *Whitaker v. Kirby*, 54 Ga. 277; *Thornburgh v. Madren*, 33 Iowa, 380; *Carpenter v. King*, 9 Met. 511; Brandt Suretyship, etc., sec. 211; and see *Musgrave v. Glasgow*, 3 Ind. 31.

This action was commenced December 26th, 1878, more than seven years after the arrangement by which Taylor was to have been released from his liability on the note. The record does not show when Pattie, Smith & Co. became insolvent, but it was probably but a short time before suit, as they paid \$200 of the principal of the note May 17th, 1877, and on July 16th, 1878, paid all the interest due to that date. During all this time no notice was given to the surety that the arrangement made between himself, Lohman and Pattie, Smith & Co. had not been consummated. From the anxiety manifested at that time by Taylor, to be discharged from his liability on the note, the conclusion is irresistible that he would have given statutory notice to the holder to seasonably sue thereon (2 R. S. 1876, pp. 276-7), or have taken other measures to protect himself. To keep the surety so long in ignorance that the note had neither been paid, nor exchanged for the note of Pattie, Smith & Co., had all the effect of a fraudulent concealment of facts, whether so intended or not.

Had there been no element in the case, other than mere delay on the part of the appellee to enforce payment of the note, the surety would not be discharged from liability; but, by the agreement testified to by the witness Pattie, if the appellee did not elect to receive payment from Pattie,

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Smith & Co., the loan was to be continued on their individual credit. According to the testimony of this witness, Lohman stated that he did not want the money ; and that he did not, but preferred that it should be on interest, is further evident from his failure, for so many years, to collect the principal, and his usual promptitude in collecting the interest. On the facts proved, we think the acts of the appellee show a reloaning of the money to Pattie, Smith & Co.

There being no conflicting testimony, this court will weigh the evidence, and give it such effect as, in its judgment, should have been given by the court which tried the cause. *Jamieson v. Miller*, 54 Ind. 332 ; *Roe v. Cronkhite*, 55 Ind. 183.

For error of the court below, in overruling appellant's motion for a new trial, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be, and the same is hereby, in all things reversed, at the costs of the appellee, with instructions to the Jefferson Circuit Court to grant the appellant a new trial.

ON PETITION FOR A REHEARING.

BICKNELL, C.—The petition claims that the evidence did not sustain the answer. The first paragraph of the answer sets forth the facts specially, alleging that thereby the defendant “was discharged from all liability on the note.” Among the facts stated was the following: “That the plaintiff then and there did reloan said money to Pattie, Smith & Co., and kept it on loan to them alone from 1872 to 1878.”

The second paragraph alleged payment of the note by Pattie, Smith & Co. before suit brought. The third paragraph pleaded a discharge of the defendant by the plaintiff, for a good and valuable consideration.

The evidence is fully stated in the opinion of the court heretofore given.

We think that the evidence did sustain the answer. When

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one of the principal debtors and the surety and the creditor met together, and the surety gave notice that he would not stand any longer on the note, etc., the principal debtor then had the money to pay the notes, and proposed to the creditor to pay them, or give a new note of the principal alone. He said: "If you will let our firm have the money on our own note, we will take it, otherwise we will pay you off." The creditor replied: "I don't want the money. I will take Taylor's name off the notes. I will bring down the notes and fix the matter up, and either get new notes or take the money." If the notes had been there, and had been cancelled, or Taylor's name "taken off," and a new note given of the firm alone, the surety would have been discharged. That would have been equivalent to an actual payment of the money, and a reloan of it to the firm alone; and, whether the notes were formally cancelled or not, and even if they had remained in the possession of the creditor, the payment of the money and a reloan of it to the firm, on their note alone, would have discharged the surety; and in such a case it would make no difference whether the money was actually handed over to the creditor and then reloaned to the principal debtors, or whether it was permitted to remain in their hands as a new loan to them, in execution of an agreement to that effect; the merely formal act of handing over the money and then returning it would not be indispensable to make such a transaction a payment and a reloan.

The evidence in the case shows that the special transactions between the parties took place in 1871, and that the principal debtors paid interest on the money for several years afterward, and actually paid the money mentioned in one of the notes; the last payment of interest on the note in suit was in July, 1878, and this suit was brought in December, 1878; the principal debtors having become insolvent, and the note in suit having been permitted to remain in the possession of the creditor, he brings suit upon it, claiming that

 Willson v. Binford, Administrator.

the transactions proved amounted to nothing, and that his agreement in the premises amounted to nothing, because it was without consideration. The evidence shows that his agreement was executed, the only inference that can be made from the facts proved, consistent with honesty and fair dealing upon the part of the creditor toward the surety, is that the transaction amounted to a payment of the original notes and a reloan of the money to the principal debtors. The original notes having been paid the surety was discharged, whether the notes were left in the creditor's possession or not, and whether a new note of the firm was taken or not. It is not necessary to refer again to the authorities cited in the former opinion. We think the facts did sustain the answer.

The petition for a rehearing ought to be overruled.

PER CURIAM.—Petition overruled.

74	424
147	614

 No. 8811.

WILLSON v. BINFORD, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Suits by Administrators.*—*Appeal.*—*Practice.*—*Supreme Court.*—*Cases Distinguished.*—Appeals to the Supreme Court in suits by executors and administrators, authorized by sections 4 and 21 of the civil code, are regulated by, and must conform to, the requirements of the code on the subject of appeals, and are not governed by sections 189 and 190 of the act providing for the settlement of decedents' estates. *Seward v. Clark*, 67 Ind. 289, and *Bell v. Mousset*, 71 Ind. 347, distinguished.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries, S. C. Willson, L. B. Willson, J. E. McDonald and J. M. Butler, for appellant.

A. D. Thomas, C. L. Thomas, P. S. Kennedy and W. T. Brush, for appellee.

Willson v. Binford, Administrator.

Howk, C. J.—In this case the appellee filed a written motion in this court, in substance as follows: “The appellee moves the court to dismiss this case, for the reason that the appeal was not taken in time.”

The record shows that this was a suit by the appellee against the appellant as the assignor of certain promissory notes, not governed by the law merchant, and such proceedings were therein had as that, on the 28th day of February, 1880, a judgment was rendered by the court below in favor of the appellee and against the appellant, for the amount found due on the notes and the costs of suit. From this judgment the appellant, the defendant below, appealed by filing an appeal bond to the approval of the court, within the time given therefor, and perfected his appeal according to law by filing a transcript of the record in the clerk's office of this court, on the 8th day of June, 1880, or in less than four months after the judgment was rendered.

It is claimed by the appellee's counsel, in argument, that the case at bar is one of the cases in which an appeal to this court could only be taken in conformity with the provisions of sections 189 and 190 of the act providing for the settlement of decedents' estates, etc., approved June 17th, 1852. In support of their position the learned counsel cite *Seward v. Clark*, 67 Ind. 289, and *Bell v. Mousset*, 71 Ind. 347. But these cases are not in point, and do not sustain the appellee's position. The cases cited merely decide that in all suits or proceedings, under and pursuant to the provisions of the act for the settlement of decedents' estates, and not authorized by any other statute, appeals to this court must be taken in conformity with the requirements of said sections 189 and 190, and not otherwise. That far forth the cases referred to, we think, were clearly right, and we approve and adhere to them.

But such suits as the one now under consideration were expressly authorized by sections 4 and 21 of the civil code,

Swift et al. v. Ratliff.

and are not prosecuted under or governed by the provisions of the act for the settlement of decedents' estates. In such suits appeals to this court are regulated by, and must conform to, the requirements of the civil code on the subject of appeals. *Rusk v. Gray, ante, p. 231.*

In the case before us, the appeal was taken and perfected, as we have seen, within one year from the rendition of the judgment, as required by section 561 of the civil code of 1852, as amended by section 2 of the act of March 14th, 1877. Acts 1877, Spec. Sess., p. 59. The appeal, therefore, was "taken in time."

Appellee's motion to dismiss this appeal, therefore, is overruled, at his costs.

No. 7475.

SWIFT ET AL. v. RATLIFF.

PLEADING.—*Complaint. — Promissory Note. — Payee's Indorsement. — Indorsers. — Consideration.*—Where a complaint against the makers and indorsers of a promissory note contains an averment that the indorsement of the latter was made "on said day and at the same time of the making and delivery of said note," it is manifest that, even if the payee's indorsement appear first, and he is bound as the first indorser, the names of the other indorsers were on the paper when received by the plaintiff, and that the instrument imported a consideration against them all, and no special averment of a consideration was necessary:

PRACTICE.—*Instructions not Signed by Judge. — Bill of Exceptions. — Order of Court.*—Where there is no bill of exceptions, nor order of the court, whereby instructions to the jury are made a part of the record, and they are not signed by the judge, they are not properly in the record.

SAME.—*Evidence. — Promissory Note. — Discharge of Surety by New Writing. — Burden of Proof. — Production of Writing. — Proof of Contents.*—One who sets up a defence, whereby he claims a release from one writing by reason of the execution of another, does not shift the burden of

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proof on the subject until he shall have produced the new writing on which he relies, or, having shown a good excuse for not producing it, shall have proved its contents.

SAME.—*Release of Surety.—Extension of Time.*—Where one seeks release from a promissory note for the reason that the plaintiff took a note payable in bank in payment of interest thereon, in advance, and thereby created an implied agreement to extend the time of its payment, the interest note is the best evidence of its own contents, and where, being present and sufficiently identified and its execution proved, it was not offered in evidence, the Supreme Court can not say that parol evidence of its terms was improperly excluded, or that a verdict against the defendant ought to have been different.

SAME.—*Judicial Discretion.—Recalling Witness.*—It is a matter of judicial discretion, whether a witness once discharged from the witness stand may be recalled by the party who first called him.

SAME.—*Repetition of Testimony.*—To exclude a mere repetition of testimony is not an available error.

From the Wayne Superior Court.

W. D. Foulke, J. L. Rupe and L. D. Stubbs, for appellants.

W. A. Peelle and D. W. Comstock, for appellee.

WOODS, J.—Complaint by the appellee against the makers and endorsers of a promissory note, charging, in substance, that on the 8th day of November, 1876, the defendant, The Robinson Machine Works, made its promissory note to Jonas W. Yeo, for the sum of \$7,717.50; that after the execution of the note, to wit, on the day and year last aforesaid, the said Jonas W. Yeo, in writing, on the back of said note, endorsed the same to the plaintiff; and on the same day, and at the same time of the making and delivery of said note, the defendants, “Henry E. Robinson, Francis W. Robinson, Robert H. Shoemaker and Richard H. Swift, each using the initial letter of his christian name, in writing, on the back of said note, endorsed the same to said plaintiff.” That said note is due and unpaid, etc.

A copy of the note and endorsement was filed with the complaint, of the tenor following, viz.:

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“\$7,717.50.

RICHMOND, IND., Nov. 8th, 1876.

“Six months after date we promise to pay to the order of Jonas W. Yeo, seven thousand seven hundred and seventeen $\frac{5}{100}$ dollars, at the First National Bank of Richmond, Ind. Value received, without any relief from valuation or appraisement laws, with interest at the rate of ten per cent. per annum from maturity, and five per cent. attorney's fees if suit be instituted on this note. The drawers and endorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note.

[Signed]

“ROBINSON MACHINE WORKS,

“*By H. E. Robinson.*”

Endorsed: “Jonas W. Yeo, H. E. Robinson, F. W. Robinson, R. H. Shoemaker, R. H. Swift.”

The defendants filed affirmative answers, to which the plaintiff replied in denial. Trial by jury, verdict and judgment for the plaintiff. The appeal is prosecuted in the names of said Swift, and his assignee in bankruptcy, Barzilla W. Clark. The other defendants have formally declined to join in the appeal.

It is assigned for error, that the complaint does not state facts sufficient to constitute a cause of action against Swift, and that the court erred in overruling his motion for a new trial.

The objection made to the complaint is, that it shows that the payee of the note, Yeo, first endorsed it to the plaintiff, and that thereafter Swift and the others endorsed it; wherefore it is claimed that the latter endorsement was without consideration, and ineffective in the hands of the appellee. We do not think this a right interpretation of the averments of the complaint. The allegation of the endorsement by Yeo comes first in order, but is to the effect simply, that it was made on the day the note bears date; but, of the endorsement by the other parties, the averment is, that it was made “on said day, and at the same time of the making and de-

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livery of said note.” If, therefore, it be considered, as is claimed, that said Yeo was more than a nominal payee, and that he was bound as the first endorser, still it is manifest that the names of the other endorsers were on the paper when received by the plaintiff. That being so, the instrument imported a consideration against them all, and no special averment of consideration was necessary.

Among the causes assigned for a new trial are alleged errors in the instructions of the court to the jury. There is no bill of exceptions, nor order of the court, whereby the instructions are made a part of the record. There is, in the transcript, a series of instructions, which, according to the recital of the clerk, were given by the court, and, perhaps, in writing, though it is not so stated. They are not signed by the judge, and consequently are not properly in the record. *Zehner v. Aultman*, ante, p. 24; *McDaniel v. Mattingly*, 72 Ind. 349.

Counsel have brought to our attention but one other cause for which a new trial was claimed, and that is the refusal of the court to permit the witness Henry E. Robinson to answer certain questions propounded on behalf of the appellant Swift. The questions proposed, and the statement of what was expected to be elicited thereby from the witness, as set forth both in the motion for a new trial and in the bill of exceptions, are as follows:

“1st. State the conversation that occurred in the afternoon with Joseph Ratliff and you in regard to the interest note, when Cornelius Ratliff and Joseph were at the office of the Robinson Machine Works.

“2d. What, if anything, was said by Joseph C. Ratliff about the note in suit at the conversation held with him in the office of the Robinson Machine Works on the afternoon of May 20th, 1877?

“3d. State whether or not any note in connection with

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this matter was delivered by you to Joseph C. Ratliff on that afternoon, and, if so, produce the note if you can.”

“And said defendant Swift, at the time of propounding said questions, announced to the court that he proposed and offered to prove by said witness, that a note payable in bank was executed by said Robinson Machine Works to Cornelius Ratliff for six months’ interest on the note in suit, and the time for its payment extended for six months as alleged in the answer of said Swift to the plaintiff’s complaint, and that the note was then delivered to Joseph C. Ratliff, who took it away with him; and the plaintiff, at the time each of said questions was asked of said witness, objected to the same, and the court sustained the objection and excluded the evidence, but said that the witness would be permitted to testify in answer to the questions if the witness would state that it was in the presence and hearing of Cornelius Ratliff, the witness having already stated that Cornelius Ratliff was not present.”

These questions and the proposed answers are claimed to have been pertinent and admissible under two paragraphs of Swift’s answer, wherein he claimed to have signed said note only as indorser or surety, and that on the 19th day of May, 1877, in consideration of a note “for \$385.87 for six months interest in advance, up to November 8th, 1877, on the note sued on, with interest at ten per cent. per annum after maturity, and payable at the First National Bank of Richmond, Ind.,” made by said Robinson Machine Works to the plaintiff, the plaintiff had agreed to extend and had extended the time of payment of the note in suit, until November 8th, 1877, without said Swift’s consent.

The bill of exceptions shows that these questions were asked after all the other evidence in the case had been adduced, there having been none except that offered in defence, and the appellants claim that such proof had already been made of the agency and authority of Joseph C. Ratliff

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to act and speak for his father, Cornelius, in the premises, as to make the proposed evidence admissible, though said Cornelius was not present at the time and place referred to.

In order to afford a proper understanding of the question presented, and to show the grounds of our decision, it is necessary to set forth at some length parts of the testimony actually delivered by said witness, Robinson. Being sworn and shown the note sued on, he said: "This note was due May 8th. About the 19th of May last I first had a conversation with Cornelius Ratliff with reference to the extension of this note, at the office of Robinson Machine Works; * * * I asked Mr. Ratliff to renew the note, omitting the indorsement of R. H. Swift; * * * Joseph Ratliff was with him. It was on the following day Joseph Ratliff explained that they had come down with reference to this note; * * * that his father was uneasy about it. * * * A suggestion was made, I don't know who by, to continue the old note by payment of interest. * * * Mr. Yeo replied that it would be as well to release Mr. Swift at once, as the payment of interest in advance would not only release him but the other indorsers. * * * In the afternoon of the same day, I think, [Joseph Ratliff came to my desk at Robinson Machine Works and said: 'We have concluded to take a separate note for the interest for six months.']" This statement in brackets objected to, and objection sustained. Cross examination: "The interest note was not sent to the bank; it was given to Joseph Ratliff. This note was signed by Robinson Machine Works, and indorsed by all who indorsed the original note except Swift. I have the interest note; the principal note was sent to the First National Bank." Witness, being recalled and shown the note, said: "In the afternoon Joseph Ratliff came to my office and said: 'We have concluded to take a separate note for the interest, if that is satisfactory to you.' I executed this note. * * * At the time of the conversation, when Cornelius was present,

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in the forenoon, * * the interest note had not been written yet; * * * I did not see Cornelius there in the afternoon. In conversation in the forenoon there was nothing said about interest note, and none drawn up. * * * The interest note was brought back by Joseph Ratliff on the 30th of May. In the morning conversation they were both present. * * Joseph Ratliff did not say that they would go up town and take advice and come back and let us know about the interest note. He did not come back in the afternoon and say that the interest note was not satisfactory; he did not say in the afternoon, 'we decline to take the note.' I did give Joseph Ratliff the interest note in the afternoon. Joseph did not say that he would prefer Swift's name on it. I think he gave a receipt for the note. I don't remember whether the receipt was returned to him or not. I do know there was a receipt given. The note was not returned on the same day."

A comparison of the testimony given by this witness with that proposed to be drawn from him, in response to the questions which were forbidden to be answered, shows that he had already stated all which it was competent for him to say, of what it was proposed that he should say, in response to those questions. Of all which it was proposed to show, there remains unanswered nothing but what was a part of the terms of the note, as that it was payable at bank and the like; and these should have been shown by putting the note itself in evidence. The note was present, was sufficiently identified, *prima facie* proof of its execution made, and it was the best evidence of its own contents. But no offer was made to read it in evidence, and, without it, it is not clear that upon any state of proof the verdict ought to have been different. The theory of the answer is, that the plaintiff took a bank note in payment of interest in advance on the note in suit, and that such payment created an implied agreement to extend the time of payment on the prin-

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principal note for the time for which the interest was paid ; but, until the note given in payment of the interest is put in evidence, it can not be known or presumed that it did not in terms reserve the right of the holder to bring suit on the principal note, or contain some other provision which would avoid any claim of a discharge from liability of any party to the original paper. One who sets up a defence whereby he claims a release from one writing, by reason of the execution of another, can hardly be credited with having shifted the burden of proof on the subject, until he shall have produced the new writing on which he relies, or, having shown a good excuse for not producing it, shall have proved its contents. But, aside from this question, it is clear, for the reasons already given, that the court committed no error in excluding the proposed answers to the questions under consideration. It is, in some measure, a matter of judicial discretion whether a witness, after being once discharged from the stand, may be recalled at all by the party who first called him, but it can never be an available error to exclude a mere repetition of testimony already delivered.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

 No. 8035.

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145	54

LEASE.—*Mode of Occupation.*—*Special Use.*—*Injunction.*—Where the mode of occupation is fixed by a lease, or where the purpose of a lease is expressed therein, or where the intention of the parties to confine the leased premises to a special use, may be fairly implied from the words of the lease, the tenant may be enjoined from converting the property

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to other purposes; but without such express language, or such reasonable implication, there is no such restriction upon the tenant.

SAME.—*Restriction of Use.—Agreement.*—A written agreement between A. and B. recited that A. had leased to B. “the following real estate, to wit,” followed by a description of five acres of land by metes and bounds, concluding, “containing a certain steam saw-mill, dwelling-house,” etc., with the privilege of using all the timber on the premises, but with the restriction that all the valuable timber be used only for mill purposes, or in the improvement of the premises.

Held, that such lease did not restrict the lessee to the use of the land for the purposes of the mill only.

SAME.—*Duration of Lease for Years must be Certain.—Fee Simple.*—Leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain, and leases of an uncertain duration are not valid leases for years.

QUERY.—Whether a lease to continue until an uncertain contingency does not create an estate in fee in the lessee, determinable upon the happening of the contingency.

SAME.—*Contract.—Intention of Parties.*—The intention of the parties to a contract must be gathered from the language of the contract, and when that is plain, and there is no mistake in it, it is conclusive.

From the Morgan Circuit Court.

W. S. Shirley and *J. H. Jorden*, for appellants.

G. W. Grubbs and *M. H. Parks*, for appellees.

BICKNELL, C.—This was a suit by the appellants, as assignees of a lessor, against the assignees of a lessee and their sub-tenants.

The appellees demurred to the amended complaint for want of a sufficient cause of action; the court sustained the demurrer, and final judgment was rendered against the appellants.

The amended complaint avers that, on the 2d of January, 1863, William Reed and Peter Applegate agreed in writing that said Reed, in consideration of the covenants herein mentioned, of said Applegate, doth hereby demise, grant and lease unto him, his executors, administrators and assigns—but there is to be no assignment to any other than said Reed, if he will pay the price for the machinery offered by other parties—from the 2d day of February, 1863, until the ma-

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chinery on the herein described premises shall be removed, the following real estate, to wit: Then follows a description by metes and bounds, with the statement that the said metes and bounds shall contain five acres, which description concludes thus: "Containing a certain steam saw-mill, dwelling-house," etc.; and, "in consideration of said lease, the said Applegate covenants and agrees to operate said mill as a lumber mill during a part or all of the time it shall remain on said premises. The said Reed grants to said Applegate the privilege to use all the timber on said premises, reserving all the valuable timber, to be used only for mill purposes or improvement of said premises;" that at the date of this lease said Reed owned forty acres of land, on which were no improvements except said steam saw-mill and said dwelling-house used in connection therewith; that said Applegate kept the saw-mill in operation two years, and then assigned the lease to Lewis and Wigall, two of the appellees; that in July, 1872, said Reed conveyed the entire forty acres to the appellants, and that the appellees Lewis and Wigall, without consent of appellants, have laid off and enclosed, upon said five acres, two lots, and have built a house on each of said lots, which houses are occupied by Miller, Cavanness and Wyatt, three of the appellees, as sub-tenants of said Lewis and Wigall, but not in connection with said saw-mill; that in 1874 said Lewis and Wigall, without the consent of the appellants, built and enclosed, upon said five acres, a steam flour and grist mill, and a hog-pen, and have ever since continued to use the same; that thereby the appellants are deprived of the use of said five acres or any part thereof; that the appellees refuse to pay any rent to the appellants; that said Lewis and Wigall are receiving all the rents for said two houses, and for said flour and grist mill, to the damage of the appellants five hundred dollars; that appellants, before suit brought, demanded of the appellees possession of said premises, except said saw-mill and dwelling-

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house, and except so much of said five acres as was used in connection with the saw-mill and dwelling-house. The amended complaint demanded judgment for the possession of said two dwelling-houses, and of said flour and grist mill, and for five hundred dollars as the rent thereof, and for possession of all of said five acres, except what is necessary for said saw-mill and the dwelling-house connected therewith, and that the appellees be enjoined from using and occupying said five acres, except in connection with the use of said saw-mill and dwelling-house, and that the appellants may have all other proper relief. The error assigned is, that the court erred in sustaining the demurrer to the amended complaint.

The complaint, as amended, assumes that the five acres were leased for the sole purpose of operating a saw-mill, and that any other use of the demised premises is therefore unwarranted. Where the mode of occupation is fixed by the lease, or where the purpose of the lease is expressed therein, or where the intention of the parties to confine the leased premises to a special use, may be fairly implied from the words of the lease, then the tenant may be enjoined from converting the property to other purposes. 1 Washburn Real Property, 546 ; *Steward v. Winters*, 4 Sandf. Ch. 587 ; *Maddox v. White*, 4 Md. 72. But without such express language, or such reasonable implication, there is no such restriction upon the tenant.

The writing in controversy in this case is not a lease of a saw-mill and five acres of land to be used only for the purposes of the mill ; it is a lease of five acres of land, described by metes and bounds, and the subsequent words, "containing a certain steam saw-mill and dwelling-house," etc., do not limit the extent of the grant. There is nothing in the instrument, from which it can be inferred that the parties intended to confine the use of the land to the requirements of the saw-mill ; on the contrary, the lessor agreed that the lessee and his assigns might use, for any purpose, all the

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timber on the premises, reserving only the valuable timber "for mill purposes or improvement of the premises." The fair construction of the instrument is, that the saw-mill is to be operated while the machinery is there, and that the lease is to end when the machinery is removed, and that the valuable timber must be used exclusively for mill purposes and for improvement of the premises.

It is not averred in the complaint, that the saw-mill is not operated, nor that the machinery has been removed, nor that the valuable timber has been misapplied, nor that the additional improvements on the five acres hinder in any way the use of the saw-mill and its dwelling-house.

The lease in controversy was uncertain in its duration. Leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain. 1 Shep. Touch. 272; Co. Litt. 45 b.

Formerly, in case of uncertain leases made until such a thing be done, or so long as such a thing shall continue, if livery of seizin were made upon them, they might have been good leases for life, determinable upon these contingencies, although not good leases for years. Co. Litt, 45 b. n. 2. They were bad as leases, because of the uncertainty of their duration; they could not pass a fee for want of the word "heirs;" they were therefore held to create estates for life.

The lease in controversy is to continue until an uncertain contingency, to wit, the removal of the machinery; but, as the word "heirs" is not now necessary to create a fee, and as every grant is construed most strongly against the grantor, and conveys all he has unless a lesser estate is expressed, it would seem that here an estate in fee was created, determinable upon the happening of the contingency.

The case resembles *Wickersham v. Bills*, 8 Ind. 387. There A., B. and C. granted to E. the right to use and improve a mill-dam and race on their land, on condition that E. should build and run a grist mill, and that if he, or those holding

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under him, should fail to build the mill, or fail to keep it in operation, then the grant should cease. After building the mill, E. died, and his heirs sued the grantors for disturbing their possession of the mill and race. The defendants answered, setting up the foregoing facts, and claiming that E., the ancestor of the plaintiffs, held under them as tenant for life, and that, he being dead, the mill had reverted to them, and they had taken possession of it. To this answer the plaintiffs demurred; it was held in this court that the demurrer was rightly sustained. The court said, "We think it equally clear that his heirs should be considered as holding under him, within the intention of the parties." In other words, they held that the grantee did not take an estate for life.

But, whatever may be the estate created by the instrument in controversy, the amended complaint contained no sufficient cause of action, the demurrer to it was rightly sustained, and the judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

BICKNELL, C.—It is a clear proposition that leases of an uncertain duration are not valid leases for years. Upon such a point it is unnecessary to repeat the authorities cited in the foregoing opinion. As to the contract in suit, even if there were no element of uncertainty as to its duration, even if it were to endure for a fixed term of years by its expressed provisions, a complaint thereupon, with the same statements and claiming the same relief as the complaint in this case, could not be sustained.

The petition for a rehearing assumes that here was a lease

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for the sole purpose of operating a saw-mill, and that the intention of the parties was that the land was to be used for saw-mill purposes only, and that any other use of the property would violate the contract and make the occupant liable to pay the other party a compensation for such use; but the intention of the parties must be gathered from the language of the contract, and where that is plain, and there is no mistake in it, it is conclusive. The writing in this case begins thus: "This agreement made and entered into," etc.; then follow the words, "demise, grant and lease the following real estate," giving its metes and bounds; then come the words, "containing a certain steam saw-mill, dwelling-house," etc.; then follow the words which grant to the party of the second part "the privilege to use all the timber on said premises," with the restriction, however, that "all the valuable timber shall be used only for mill purposes, or improvement of said premises." This last language evidently contemplates not only a use for mill purposes, but improvement of the premises besides; the "premises" were the land granted; there is nothing in any of the words of the grantor which indicates a lease of a saw-mill and five acres of land, to be used only for the purposes of the saw-mill; the valuable timber was to be used only for the purposes of the saw-mill, that was all. Now look at the covenants of the occupant: he agrees "to operate the saw-mill during a part or all of the time it shall remain on said premises," and that he will not assign to any other than the grantor, "if he will pay the price for the machinery offered by other parties;" there is no stipulation on the part of the occupant, that he will not use the five acres except for mill purposes. The instrument not only leaves him absolutely untrammelled and free as to the use of the premises, but it expressly provides for the use of the valuable timber for the improvement of the premises, and for mill purposes also. In any valid lease, the tenant, if not restrained by the

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terms of the lease, may use the premises for any lawful purpose. Yet the appellant claims a forfeiture and damages, and rent for the flouring mill, and compensation for every use of the property except the use for the saw-mill. There is no ground for forfeiture; there has been no waste; no covenant, express or implied, has been broken, and there is nothing in the agreement which warrants any such damages or compensation as the appellee in his complaint demands.

The petition for a rehearing ought to be overruled.

PER CURIAM.—Petition overruled.

No. 7038.

THE LAKE SHORE AND MICHIGAN SOUTHERN R. W. Co.
v. MCCORMICK.

SPECIAL FINDING.—Practice.—Verdict.—Where the special finding of the facts is inconsistent with the general verdict, the former will control the latter, and the court must give judgment accordingly.

NEGLIGENCE.—Employer and Employee.—Agreement as to Risks.—An employee, when he enters the service of an employer, impliedly agrees to assume all risks ordinarily and naturally incident to the particular service; and the employer impliedly agrees that he will not subject the employee, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the employee is to be engaged.

SAME.—Obligation of Employer to Employee.—The employer's obligation is not to supply the employee with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employee to extraordinary or unreasonable danger.

SAME.—Master and Servant.—Correlative Duties.—Machinery Used.—Injury to Servant.—When a master employs a servant to do a particular kind of work with particular kind of implements and machinery, the master does not agree that they are free from danger in their use, but that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and

74	440
124	327
124	380

74	440
129	331

74	440
130	174
130	349

74	440
132	342

74	440
136	467

74	440
139	685

74	440
140	652

74	440
144	692
146	567

74	440
152	400
152	403

74	440
169	38

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prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant in the use of such machinery, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service.

SAME.—Improved Machinery.—Case Criticised.—Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but, if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for injuries which may occur to them in the use of such implements or machinery. *The St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511, criticised.

SAME.—Railroad Company.—Injury to Employee.—Brakeman.—Special Finding.—In an action against a railroad company by a brakeman for an injury received while engaged in coupling cars, by his foot being caught in a dangerously constructed frog at a switch on the line of the road, the jury found specially that the switches and frogs of the road were in the same condition during all the time the plaintiff was in the employ of the defendant, and that they were of the same kind as those used on the principal railroads in the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car, his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between the cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that, in consideration of employment by defendant, the plaintiff agreed to obey said rules; that, under the circumstances, the plaintiff used proper care to avoid injury to himself.

Held, that the defendant was not liable.

From the Laporte Circuit Court.

J. B. Niles and *J. I. Best*, for appellant.

S. L. Trippe, for appellee.

SCOTT, J.—McCormick sued the Lake Shore and Michigan Southern Railway Company for damages resulting from an injury received by him at South Bend, on the 4th day of

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October, 1876, while engaged as a brakeman on the appellant's railroad. He alleged in his complaint that, while engaged in coupling cars, he was, without fault on his part, caught in a dangerously constructed frog, which, without proper safeguards and necessary protection, was negligently allowed to remain in the track of the company's road at South Bend; that the appellant had carelessly and negligently constructed and suffered said frog to be and remain wholly without any mechanical contrivances, wooden block protections and safeguards, which could and would have rendered the same safe. The appellee further alleged that he was wholly ignorant of the condition and situation of the road at the point where he was hurt, and that he had no knowledge of such switch and frog and their unprotected condition and the absence of safeguards at that point, and had no means or opportunity of acquiring any knowledge in relation thereto. Issue was formed, and a trial by jury resulted in a general verdict for the appellee in the sum of \$5,000. The jury also returned answers to special interrogatories. The interrogatories and the answers thereto are as follows:

"1st. Were the frogs and switches on the defendant's road between Elkhart and Chicago, and at Chicago, substantially of the same character and in the same condition continuously from the 8th day of April, 1875, to the 4th day of October, 1876? Answer. Yes.

"2d. Had the frog at South Bend, in which the plaintiff's foot was caught, at the time of the alleged injury to him complained of in this case, been during all that time in substantially the same condition as when the injury occurred? Ans. Yes.

"3d. Was not that frog, and were not all the frogs and switches on said part of the defendant's road, open to view and plain to be seen by any persons inclined to look at them during all that time? Answer. Yes.

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“4th. Could any person, during all that time, looking carefully at the frogs and switches in said part of said road, including those at South Bend, plainly see and acquire full knowledge of their condition? Ans. He could, as to outward appearances.

“5th. Is it not dangerous for a person to walk on the track, among such frogs and switches, behind a moving car, without taking any notice of the frogs or switches over which he is passing? Ans. No.

“6th. Was it consistent with ordinary care and prudence, for a man to walk in front of a moving car over a frog such as that in which the plaintiff's foot was caught, without looking at or taking any notice of the frog or track over which he was walking? Ans. No.

“7th. Was the plaintiff walking on the track, behind a moving car, when the injury complained of occurred? Ans. Yes.

“8th. Could the plaintiff, between the 8th day of April, 1875, and the 4th day of October, 1876, (passing, as he did, back and forth over the road,) by the careful use of his eyesight, have ascertained the character and condition of said frogs and switches, had he tried to do it? Ans. No.

“9th. Had the plaintiff the means, during said period of time, of becoming acquainted with the fact that there were such frogs and switches at the station at South Bend, and at or near the point where he was injured in coupling cars, when the accident complained of occurred, and could he have informed himself of that fact by the careful use of his faculties? Ans. Yes.

“10th. Did not the company, during the time when the plaintiff was in its employ, have printed rules, which forbid brakemen to get between cars in motion to couple them, and all similar imprudences, which forbid coupling by hand in all cases when a stick could be used to guide the link or shackle, and enjoin upon them in all cases to take time to do their duty in safety? Ans. Yes.

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“10½. Did not the plaintiff, at the time of his employment by the defendant in April, 1875, in consideration of such employment, agree with the defendant that he would obey said rules? Ans. Yes.

• “11th. Did the plaintiff, during the time he was in the employ of the defendant, make any effort or use any care to ascertain the condition of the frogs and switches on the part of the defendant’s road over which his employment extended, or of those at South Bend? Ans. No.

“12th. Were the frogs and switches on the defendant’s road, at the time of the accident to the plaintiff, substantially of the same form and in similar condition as those generally used on the principal railroads of the United States? Ans. Yes.

“13th. Did the plaintiff, in making the coupling when the accident complained of occurred, use proper care to avoid injury to himself? Ans. Yes, under the circumstances.”

The appellant moved the court for a judgment in its favor on these special findings, which motion was by the court overruled, and to this ruling the appellant excepted. A motion for a new trial was made, and overruled by the court, and the appellant excepted to this ruling of the court. The correctness or incorrectness of these rulings is presented for the consideration and opinion of this court by the assignment of errors.

It is the settled law of this State, that when the special finding of the facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. *The Grand Rapids, etc., R. R. Co. v. Boyd*, 65 Ind. 526, and authorities there cited.

• A judicial judgment is formed like any other judgment of the human mind, and is simply a conclusion from certain premises. The law being the first or major premise, the facts being the second or minor premise; the conclusion from these premises constitutes every legal or judicial judgment.

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We regard the following propositions as sound in principle, and sustained by the weight of authority :

The servant, when he enters into the service of an employer, impliedly agrees that he will assume all risks which are ordinarily and naturally incident to the particular service ; and the master or employer impliedly agrees that he will not subject his servant, through fraud, negligence or malice, to greater risks than those which fairly and properly belong to the particular service in which the servant is to be engaged.

The master's obligation is not to supply the servant with absolutely safe machinery, or with any particular kind of machinery ; but his obligation is to use ordinary and reasonable care not to subject the servant to extraordinary or unreasonable danger.

When a master employs a servant to do a particular kind of work, with particular kind of implements and machinery, the master does not agree that the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness ; and the servant agrees that he will use such implements and machinery with care and prudence ; and if, under such conditions and circumstances, harm or injury come to the servant, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service.

In the case of *The St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511, this court sanctioned the following instruction : "It is negligence to use cars dangerous in their construction, when there are others to be secured which are not dangerous ; and railroad companies are bound to procure the best, otherwise they must be held responsible." The latter sentence

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of this instruction, if taken literally and in its broadest sense and unconnected with the former sentence, we think would go too far. Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they have in use; but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implements or machinery. *Walsh v. The Peet Valve Co.*, 110 Mass. 23; *Cayzer v. Taylor*, 10 Gray, 274; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *The Schooner "Norway" v. Jensen*, 52 Ill. 373; *Hayden v. Smithville Manufacturing Co.*, 29 Conn. 548; *Morris v. Gleason*, 1 Bradwell, 510; *The Indianapolis, etc., R. R. Co. v. Love*, 10 Ind. 554; *The Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *McGatrick v. Wason*, 4 Ohio St. 566; *Sullivan's Adm'r v. Louisville Bridge Co.*, 9 Bush, 81-89; *Nolan v. Shickle*, 3 Mo. App. 300; *Cummings v. Collins*, 61 Mo. 520; *International, etc., R. R. Co. v. Doyle*, 49 Tex. 190; *Houston, etc., R. W. Co. v. Oram*, 49 Tex. 341; *Ogden v. Rummens*, 3 Fost. & F. 751; *Williams v. Clough*, 3 H. & N. 258; *Seymour v. Maddox*, 16 Q. B. 326; *Priestley v. Fowler*, 3 M. & W. 1; *Perry v. Marsh*, 25 Ala. 659; *Ormond v. Holland*, Ellis, B. & E. 102; *Gibson v. Erie R. W. Co.*, 63 N. Y. 449; *Wonder v. Baltimore, etc., R. R. Co.*, 32 Md. 411; *Summersell v. Fish*, 117 Mass. 312; *Tinney v. The Boston, etc., R. R. Co.*, 62 Barb. 218, and 52 N. Y. 632; *Columbus, etc., R. W. Co. v. Arnold*, 31 Ind. 174; *Malone v. Western Transportation Co.*, 5 Biss. 315; *Kielley v. Belcher, etc., Mining Co.*, 3 Sawyer, 437; *Warner v. The Erie R. W. Co.*, 39 N.

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Y. 468, and 49 Barb. 558 ; Wharton Law of Negligence, secs. 213 and 244, and the authorities there cited.

The following are the facts found specially by the jury as embodied in the foregoing interrogatories, and the answers thereto :

The appellant owned a railroad ; the appellee was employed as a brakeman on the road ; that on the road there were certain switches and frogs ; that these switches and frogs were in the same condition during all the time the appellee was in the employ of appellant ; that these switches and frogs were of the same kind as those used on the principal railroads in the United States ; that these frogs were plain to be seen by any person inclined to look at them ; that the appellee had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the appellant's road, including the one at South Bend ; that the appellee, during the time he was in the employ of the appellant, made no effort, nor did he use any care, to ascertain the condition of the frogs and switches at the place where the injury to him occurred ; that the appellee was walking on the track of the railroad behind a moving car, when his foot was caught in one of these frogs, and was injured while coupling cars ; that the company had printed rules, while the appellee was in its employ, which forbid brakemen to get between cars in motion to couple them ; which forbid coupling by hand in all cases, when a stick could be used to guide the link ; and said rules enjoined upon them, in all cases, to take time to do their duty in safety ; that the appellee, in consideration of his employment by the appellant, agreed to obey said rules ; that appellee, under the circumstances, used proper care to avoid injury to himself.

From the law as we have stated it in the foregoing propositions, and from the special finding of facts by the jury, as herein set out, we are forced to the conclusion, as a logical and legal sequence, that the appellant was not guilty of such

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negligence as made it liable to the appellee for the injury so received by him; but that the injury to the appellee was the result, rather, of an accident, the risk of which the appellee must be deemed to have taken upon himself when he entered into the service of the appellant.

The special finding of facts, in our opinion, is inconsistent with the general verdict, and in view of the well settled law, above referred to, the motion of the appellant for judgment in its favor on the special finding should have been sustained.

The judgment is reversed, and cause remanded with instructions to the circuit court to sustain the appellant's motion for a judgment on the special finding, and to enter judgment accordingly.

Opinion filed at the November term, 1880.

Petition for a rehearing overruled at the May term, 1881.

No. 9639. •

KEPLEY ET AL. v. OVERTON ET AL.

PARTITION.—Will.—Testator.—Real estate devised can not be partitioned contrary to the intention of a testator, expressed in his will.

From the Washington Circuit Court.

H. Heffren and *J. A. Zaring*, for appellants.

A. B. Collins, for appellees.

WOODS, J.—The appellants made petition for the partition of real estate, claiming as devisees under the last will of Jane Overton. The petition shows that, in reference to the lands of which partition is sought, the will contains the following clause, namely: "I want the lands all kept together until the youngest child becomes of age, and then

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the lands or proceeds thereof to be equally divided among the above named heirs." It is further alleged in the petition, that all the devisees are of age, except three, who are aged respectively thirteen, fifteen and eighteen years; that, before the youngest will become of age, the lands will greatly depreciate in value; that all the improvements thereon are going to decay, etc.

The court below held that a partition would be contrary to the expressed intention of the testatrix, and therefore could not be had. In this the court was right. The 10th section of the act concerning the partition of lands expressly declares that the "court shall not order or affirm partition of any real estate contrary to the intention of a testator, expressed in his will."

It is not a question, as counsel for the appellants seem to think, whether the devisees have, under the will, vested interests which they may alienate. Granted that their interests are vested, and may be sold and conveyed in their undivided condition, still they can not have partition thereof.

Judgment affirmed, with costs.

74	449
187	143

No. 7578.

THE CITY OF GREENCASTLE v. MARTIN.

CITIES AND TOWNS.—Negligence.—Impounding Animals Running at Large.
—Ordinance.—Complaint.—A complaint against a city, alleging that its pound fence was not high enough, that an animal impounded by the city was improperly tied, and that thereby, without the plaintiff's fault, the animal sustained injuries, contains a good cause of action. Municipal corporations are responsible to the same extent, and in the same manner, as natural persons, for injuries caused by the negligence or unskilfulness of their agents in the construction of works for the benefit of the cities or towns under their government.

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SAME.—For any negligence of its agents in the construction of a pound, or in any purely ministerial duty under a pound ordinance, a city is liable, just as a private person would be for the acts of his agents.

SAME.—*Conversion.*—*Particulars.*—*Demurrer.*—That a paragraph of complaint, alleging conversion, does not give the particulars of the conversion, is not a ground of demurrer.

PRACTICE.—*Motion to Strike Out.*—Overruling a motion to strike out part of a complaint is not available error on appeal. Where the matters objected to were parts of the transaction charged as negligence, a motion to strike them out was correctly overruled.

SAME.—*Instructions.*—*Waiver.*—Objections to instructions not argued in the brief, nor supported by authority, are waived.

SAME.—*Pound Ordinance.*—*Police Regulation.*—*Harmless Inaccuracy.*—A pound ordinance is a police regulation authorizing summary proceedings, and must be strictly adhered to; but a statement in an instruction that it is "penal in its nature," is but a slight inaccuracy, could do no harm, and ought to be disregarded.

EVIDENCE.—*Conversion.*—Where there was no proof of a wrongful appropriation, or of intent to make a wrongful appropriation, of an animal impounded by a city marshal under a city ordinance, a finding against the city, upon a paragraph of complaint charging such a conversion by the city, is not sustained by the evidence.

SAME.—*Negligence.*—A paragraph of complaint charging a city with negligence in four particulars: 1st, building the pound fence too low; 2d, tying the animal of plaintiff with a rope too long; 3d, failing to post up notice of impounding; and 4th, failing to offer the animal for sale at the end of forty-eight hours after the posting, is not sustained by sufficient evidence, where no witness testified that the fence was too low, or that the animal was improperly tied, or that the failure to post notices or to sell produced the injury complained of, or had any tendency to produce it.

SAME.—A city is not shown to have been guilty of the negligence which was the proximate cause of an injury to an animal confined in a pound, when it appears that the animal ruined itself by a wild and vicious effort to overleap a fence sufficient to confine any ordinary animal of the horse kind.

SAME.—*Pound Fence.*—When a pound fence intended to confine horses and cattle is proved to be sufficient for its purpose by competent and credible witnesses, and no testimony is introduced to the contrary, such proof settles the question as to the sufficiency of the fence, and the mere fact that an animal confined in such pound, and properly cared for there, kills itself by rushing against such fence, or by kicking against it, or by trying to clear it in leaping, does not impair the testimony of those witnesses, and has no tendency to prove the insufficiency of the fence.

From the Putnam Circuit Court.

The City of Greencastle v. Martin.

T. Hanna, S. A. Hays and W. H. Crow, for appellant.
H. H. Mathias, C. C. Matson, D. E. Williamson and A. Daggy, for appellee.

BICKNELL, C.—The city of Greencastle had an ordinance to prevent certain animals from running at large in the city. The ordinance required the city marshal to take up and impound such animals, and to give immediate notice thereof by posting; and, if the owner should fail to appear within forty-eight hours after the posting, then to sell the animals, etc. Under this ordinance, the city marshal took up and impounded the appellee's mare, and kept her in the city pound, from Monday until the next Friday morning, without any posting or offer to sell; and then the mare jumped over the pound fence and broke her leg, and thereby became valueless, and was killed by the marshal.

No question is made as to the authority of the city to enact and enforce said ordinance.

The complaint seeks to recover damages from the city for the alleged negligence of the marshal. It contains three paragraphs; the appellee concedes that the third paragraph was bad. The first paragraph charges negligence; the second paragraph charges a conversion.

Demurrers to the first and second paragraphs were overruled. A motion to strike out from the first paragraph all the allegations of negligence, except as to the alleged improper construction of the pound, was overruled. The appellee answered in two paragraphs, the first of which was the general denial. A demurrer to the second paragraph of the answer was overruled; and a reply was filed in denial of said second paragraph. The issues were tried by a jury, who returned a verdict for the appellee.

The appellant's motion for a new trial was overruled, and judgment was rendered upon the verdict. The appellant assigns errors as follows:

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First. The court erred in overruling the demurrers to the first and second paragraphs of the complaint.

Second. The court erred in overruling the motion to strike out part of the first paragraph of the complaint.

Third. The court erred in overruling the motion for a new trial.

The appellant urges that, for such injuries as are set forth in the first paragraph of the complaint, cities are not liable.

There are conflicting authorities upon the liability of municipal corporations for the acts of their servants, but the law of Indiana is as follows: "Municipal corporations are responsible to the same extent, and in the same manner, as natural persons, for injuries occasioned by the negligence or unskilfulness of their agents in the construction of works for the benefit of the cities or towns under their government." *Ross v. The City of Madison*, 1 Ind. 281; *Stackhouse v. The City of Lafayette*, 26 Ind. 17; *Brinkmeyer v. The City of Evansville*, 29 Ind. 187.

The material averments of the first paragraph of the complaint are: "That said injury to said mare was caused by the negligence and unskilfulness of the defendant and its servants, in this, to wit: The defendant so negligently and unskilfully constructed the said fence, surrounding said inclosure or pound, that the same was not sufficient in height to prevent animals therein confined from jumping out, or attempting to jump out; that the defendant, by its servants, negligently tied said mare next to said fence, and with rope sufficiently long to enable the mare to jump over said fence, without breaking said rope at its fastening; that said defendant, by its servants, negligently failed to give notice of the taking up and impounding of said mare immediately thereafter, as by said ordinance required to do; that said defendant, by its servants, negligently failed to offer said mare for sale, within the time by said ordinance required. And the plaintiff further says, that said injury to said mare

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was not caused by any fault or negligence on his part, and that, by reason of such injury, so caused by the negligence and unskilfulness of the defendant and its servants, he is damaged," etc.

So far as this paragraph alleges that the fence was not high enough, and that the mare was improperly tied, and that thereby, without fault of the appellee, the damages were sustained, it contains a good cause of action, under the authorities hereinbefore referred to. See, also, *Mayor, etc., v. Furze*, 3 Hill, 612; *The Rochester W. L. Co. v. The City of Rochester*, 3 N. Y. 463; *Lloyd v. Mayor, etc.*, 5 N. Y. 369.

For any negligence of its agents in the construction of the pound, or in any purely ministerial duty under the pound ordinance, the city is liable, just as a private person would be for the acts of his agents. Cooley Torts, 122, 379. There was, therefore, no error in overruling the demurrer to the first paragraph of the complaint.

The second paragraph of the complaint alleges a conversion, as follows: "That the defendant, on," etc., "at," etc., "wrongfully converted to its own use one sorrel mare, the property of the plaintiff, of the value of one hundred and fifty dollars, to the plaintiff's damage one hundred and fifty dollars." It is claimed that the particulars of the conversion ought to be given; but that objection is not ground of demurrer. There was no error in overruling the demurrer to the second paragraph. *Hon v. Hon*, 70 Ind. 135.

As to the motion to strike out part of the first paragraph of the complaint, this court holds that overruling such a motion is not available as error on appeal. *Brinkmeyer v. Helbling*, 57 Ind. 435; *Hon v. Hon*, 70 Ind. 135. But the motion to strike out was rightly overruled. Negligence is a question of fact for the jury. The matters objected to were parts of the transaction; they are charged as negligence. It was for the jury to determine upon the evidence, whether the

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acts and omissions charged as negligence amounted to negligence or not.

As to the motion for a new trial, the fourth, fifth and sixth reasons alleged therefor relate exclusively to the admission of testimony, and these reasons can not be considered, because the bill of exceptions fails to show any exception taken to the admission of testimony.

The first, second, third and seventh reasons alleged for a new trial relate exclusively to the instructions to the jury. The third reason is that the court erred in giving to the jury instructions asked for by the appellee and marked 1, 2 and 6. The objections to those instructions marked 1 and 2 are not argued in the brief nor supported by authority. They are therefore waived. *Payne v. McClain*, 7 Ind. 139.

Instruction No. 6, given to the jury at the request of the appellee, is as follows: "The city ordinance providing for the impounding of horses is penal in its nature, and in such cases there must be a strict compliance with the terms, conditions and provisions of such ordinance, and any deviation from such ordinance can not be justified."

The ordinance is not penal; it is a police regulation authorizing summary proceedings, and, therefore, like a penal ordinance, it must be strictly adhered to; but the slight inaccuracy in the phrase, "penal in its nature," could do no harm, and ought to be disregarded.

The seventh reason for a new trial is not argued in the brief nor supported by authority, and it is therefore waived.

The first and second reasons for a new trial allege error of the court in giving certain instructions of its own motion, and in refusing to give certain instructions asked for by appellant, and these errors, says the appellant, are shown "by reasons given before in the brief." No other allusion is made in the brief to these alleged errors. The only "reasons given before in the brief" were in support of the demurrer to the complaint, and in support of the motion to

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strike out part of the complaint. These reasons were not sufficient for the purposes for which they were presented, and it follows that they are not sufficient for the purposes for which the appellant refers to them in regard to the instructions. The complaint being sufficient, and the motion to strike out having been rightly overruled, the instructions given by the court of its own motion were correctly given, and the instructions asked for by the appellant were properly refused. The only remaining reasons alleged for a new trial are, that the verdict was not sustained by sufficient evidence, and is contrary to law.

There was no evidence to warrant a finding for the appellee upon the second paragraph of the complaint, which charged a conversion. There was no proof of wrongful appropriation, or of intent to make a wrongful appropriation. *Wilson v. McLaughlin*, 107 Mass. 587.

In the first paragraph of the complaint, negligence is charged in four particulars: First, in building the pound fence too low; second, in tying the mare with a rope too long; third, in failing to post up notice of the impounding; fourth, in failing to offer the mare for sale at the end of forty-eight hours after the posting. The averment is that these acts of negligence caused the injury. But upon the trial no witness testified that the fence was too low; no witness testified that the mare was improperly tied, or that the failure to post notices, or the failure to sell, produced the injury complained of, or had any tendency to produce it. The only testimony upon these points was as follows:

Messer B. Welch, the city marshal, a witness for the appellee, testified: "I know something about horses; have built fences for confining horses; I am acquainted with the fence and enclosure around the city pound, and I consider it sufficient for ordinary purposes, for confining horses and other animals that are to be impounded under the impounding law; I don't know of any other stock jumping out of

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the pound ; I did not post up any notices for the sale of said mare ; I did not offer the mare for sale ; * * * the city pound fence was five plank high, seven or eight inches apart ; fence about as high as my chin, five feet five inches ; good care and attention given to the mare."

William Bosson, a witness for appellant, testified : "I was a member of the common council of Greencastle, and a member of the police committee and fire committee ; the police board had the city pound constructed ; it was constructed according to plans furnished by police board ; pound thirty feet square, five feet high ; am seventy years old, have had a good deal of experience with stock, especially horses ; think the pound was sufficient to impound stock, especially horses ; no special order for building pound ; the city paid for building the pound ; the pound was constructed in a good workmanlike manner ; I consider the pound good for ordinary purposes ; think it prudent to tie horse with a rope long enough to jump out ; more danger with a short rope than with a long one."

James M. Hays, a witness for the appellant, testified : "I was a member of the common council of Greencastle, and a member of the police board and fire committee ; I am acquainted with the nature of cows and horses ; police board had the pound constructed, and it was constructed according to plans furnished by police board ; common council intended to build an ordinary plank fence ; I think the pound sufficient to impound stock such as horses and cows, the kind of stock required to be impounded by the city ordinance."

The appellee seems to have supposed that the mere fact that the mare jumped the fence warranted the inference that the fence was too low ; but there is no room for such an inference against the uncontradicted testimony that the fence was sufficient. The failure to post up notices, and the failure to offer to sell, were undoubtedly such negligence as might make the city liable for any injury caused thereby ;

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the duty of the marshal, in relation to these matters, is a duty to the owner of the animal, and these are matters of a ministerial nature, within the scope of the actual and ostensible authority of the officer, and within the power of the city. But the question remains, was the injury in this case caused by the failure to post notice, and the failure to sell? It followed those failures, but mere sequence amounts to nothing. The appellee, in his brief, puts the argument thus: "If said mare had been advertised and sold, she would have had two days advantage of the calamity;" but the same might have been said if some stranger had poisoned or shot the mare in the pound on the fourth day.

There must be some connection between the negligence and the injury in the way of cause and effect; and the negligence which creates liability must be the proximate cause of the injury. In 2 Greenleaf on Evidence, sec. 256, it is said: "The damage to be recovered must always be the *natural and proximate consequence* of the act complained of." Proximate cause is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. Shearman & Redfield Negligence, p. 11.

Sometimes the injury is *prima facie* evidence of negligence, as in case of fire from the sparks of a railway engine. *Piggot v. The Eastern, etc., R. W. Co.*, 3 C. B. 229. So, in case of a railway engine running off the track. *Carpue v. London, etc., R. W. Co.*, 5 Q. B. 747. But, even in such cases, there can be no recovery, unless the negligence was the proximate cause of the injury. *The Pennsylvania Co. v. Hensil*, 70 Ind. 569.

In the case of *Fent v. The Toledo, etc., R. W. Co.*, 59 Ill. 349, LAWRENCE, C. J., delivering the opinion of the court, said: "If loss has been caused by the act, and it was, under the circumstances, a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause." The defendant is to be held responsible, "if

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the loss is a natural consequence of its alleged carelessness, which might have been foreseen by any reasonable person, but is not to be held responsible for injuries which could not have been foreseen, or expected, as the results of its negligence.”

These authorities are applicable to the present case. The fence being sufficient in itself, as shown by the testimony, it could not have been foreseen or expected that a failure to post notices would produce the wild act of the animal, which caused its death. When a fence is shown to be sufficient, it is as good for four days as for two.

In *Marble v. The City of Worcester*, 4 Gray, 395, a horse, running away, threw down and hurt the plaintiff; the horse was frightened by a vehicle striking against a defect in the highway. It was held that the city was not liable.

So, although there be negligence in the defendant, enough to warrant a recovery if there were no fault on the side of the plaintiff, yet the plaintiff can not recover, if the injury were really the result, in part, of “the blind violence of his animal, acting without guidance or discretion.” *Davis v. Inhabitants of Dudley*, 4 Allen, 557; *Titus v. Inhabitants of Northbridge*, 97 Mass. 258.

The principle is, that, where a duty imposed is manifestly intended for the protection of individuals, the law will give a remedy; but nobody is bound to protect a man against his own fault or against the wild and breachy action of his own domestic animals. There was no negligence in this case which was the proximate cause of the injury. The animal ruined herself by a wild and vicious effort to overleap a fence sufficient to confine any ordinary animal of the horse kind.

The verdict was not sustained by sufficient evidence, and was contrary to law. The motion for a new trial ought to have been granted, and the judgment below ought to be reversed.

Eltzroth et al. v. Voris.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is hereby, in all things reversed, at the costs of the appellee.

ON PETITION FOR A REHEARING.

BICKNELL, C.—This petition claims that there was some evidence tending to show negligence in the city, and therefore tending to sustain the verdict of the jury ; and that, under such circumstances, the verdict ought not to be disturbed. But the negligence, which creates liability, is negligence contributing to the injury ; and of this sort of negligence there was, at the trial of this case, no evidence whatever.

When a pound fence, intended to confine horses and cattle, is proved to be sufficient for its purpose, by two competent and credible witnesses, and no testimony is introduced to the contrary, that proof settles the question as to the sufficiency of such fence ; and the mere fact that a mare, confined in such pound, and properly cared for there, kills herself by rushing against such a fence, or by kicking against it, or by trying to clear it in leaping, does not impugn the testimony of those witnesses, and has no tendency to prove insufficiency in the fence.

The petition for a rehearing ought to be overruled.

PER CURIAM.—Petition overruled.

No. 7368.

ELTZROTH ET AL. v. VORIS.

REPLEVIN BAIL.—*Attestation by Justice.*—An entry of replevin bail on a judgment rendered by a justice of the peace is not void because it was not attested by the justice.

Eltzroth et al. v. Voris.

SAME.—*Delay in Issuing Execution does not Release.*—Mere delay in issuing execution will not release a replevin bail.

SAME.—*Entry After Judgment had Ceased to be Repleviable.*—*Execution.*—

The entry of replevin bail, after a judgment has ceased to be repleviable, either upon the docket of a justice of the peace or upon the record of the judgment in the circuit court, does not constitute a judgment upon which an execution can be issued.

JUDGMENT.—*Process and Service.*—*Record.*—*Default.*—It is necessary to the validity of a judgment by default against a defendant in an action, that the record should affirmatively show that process had been duly served the required length of time before the default was taken.

From the Grant Circuit Court.

G. T. B. Carr, for appellants.

G. W. Harvey, for appellee.

NIBLACK, J.—This was a complaint for an injunction. It was alleged that William J. Eltzroth and thirteen other persons, constituting the firm of William J. Eltzroth, Henry C. Rinberger and Company, on the 26th day of January, 1875, recovered judgment against one Isaac Hamilton, before Joel W. Simmons, a justice of the peace, for the sum of \$119.41; that on the 25th day of January, 1876, the plaintiff, William R. Voris, entered himself as replevin bail for the stay of execution on said judgment for the period of one hundred and eighty days; that on the 9th day of May, 1877, execution was issued on said judgment against the goods and chattels of the said Hamilton and the plaintiff, and was delivered to one David Arthurhultz, as constable of the proper township, who was about to levy said execution on the property of the plaintiff. The plaintiff asked an injunction against the justice, the judgment plaintiffs and the constable, for the reasons:

First. That the entry of replevin bail was not attested by the justice.

Second. That the entry of replevin bail had not been made until after the time for the stay of execution had expired.

Third. That, because of the delay in the issuing of ex-

ecution, Hamilton had been enabled to dispose of his property subject to execution.

Simmons, the justice, demurred to the complaint. His demurrer was sustained, and he had final judgment upon demurrer. The judgment plaintiffs and the constable made default, and upon a hearing they were enjoined from levying the execution upon the property of the plaintiff.

Error is assigned: 1st, upon the supposed insufficiency of the complaint. 2d, upon the alleged want of service of process upon the judgment plaintiffs.

The entry of replevin bail was not void, because it was not attested by the justice. *Miller v. McAllister*, 59 Ind. 491. Nor was the plaintiff released as replevin bail by the mere delay in issuing execution. *Hogshead v. Williams*, 55 Ind. 145. An entry of replevin bail, however, after the judgment has ceased to be repleviable, does not constitute a judgment upon which an execution can be issued. 2 R. S. 1876, p. 202, sec. 421; *Taylor v. Sanford*, 8 Blackf. 169; *Osborn v. May*, 5 Ind. 217.

This doctrine applies as well to entries of replevin bail on the dockets of justices of the peace, as to similar entries upon the records of judgments in the circuit courts, the object of an entry of replevin bail being the same in both cases. The complaint was, therefore, sufficient as a cause of action for an injunction.

It is, however, a well settled rule of practice, that, where a judgment is taken by default against a defendant in an action, the record must affirmatively show that process had been duly served the required length of time before the default was taken. As we construe the return to the summons set out in the record in this cause, Jonathan Hall and Amos Grim, two of the judgment plaintiffs, and two of the defendants below, were returned as "not found by the sheriff." The judgment was, consequently, erroneous as to Hall and Grim, and as they had a joint interest with their

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co-plaintiffs in the judgment before the justice, in the subject-matter of the action, we think the judgment ought to be reversed as to all the appellants.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Petition for a rehearing overruled.

No. 7230.

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74	462
135	64
74	462
141	551
74	462
146	635
74	462
155	95

NEGLIGENCE.—Presumption.—Railroad Company.—Damages.—Where, in an action against a railroad company for damages for a personal injury caused by the alleged negligence of such company, the fact has been established that the plaintiff, while a passenger in the railroad car of the defendant, was injured, without his fault, by the car in which he was riding being thrown from the track and upset, the law will presume negligence on the part of such company, unless the contrary is shown by the evidence.

SAME.—Accident from Broken Rail.—Evidence.—In such case, it is not sufficient for the defendant to show that the car was thrown from the track by reason of the breaking of a rail, sufficient in size and free from all defects, but it must also show that such broken rail had been properly laid down and spiked on sound and sufficient cross-ties.

SAME.—Instructions.—Sufficiency of Cars.—Duty of Common Carrier of Passengers.—It is not error to refuse to instruct the jury in such case, that the company has performed its full duty as a common carrier of passengers, when it has furnished for their carriage a car or caboose which will run with safety while upon its road, but will be unable to resist the crash when thrown from its track.

SAME.—Defects at Points of Road Other than Where Accident Occurred.—It was not error to instruct the jury in such case that proof of defects at other points in the road would not make a case of negligence at the place of the accident, nor render the defendant liable for the injury to the plaintiff, unless it was further shown that such defective condition caused or materially contributed to the accident.

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PRACTICE.—*Answer of Jury to Interrogatory.*—Where the jury were unable, from the evidence, to give the “hour and minute” at which the accident occurred, but returned in answer to a question as to such fact submitted to them, that, “From the nature of the question, we can not so positively answer,” the court did right in accepting such answer, and discharging the jury from the further consideration of such question.

SAME.—*Brief.*—*Waiver.*—*Supreme Court.*—Error which is not pointed out or discussed in the brief of the party assigning it will be regarded as waived by the Supreme Court.

SAME.—*New Trial.*—Questions arising under reasons assigned for a new trial, not discussed by counsel in the Supreme Court, will be regarded as waived.

From the Morgan Circuit Court.

S. Claypool, H. C. Newcomb, W. A. Ketcham, G. W. Grubbs, M. H. Parks and F. P. A. Phelps, for appellant.

B. Harrison, C. C. Hines and W. H. H. Miller, for appellee.

Howe, C. J.—In this action the appellee sued the appellant to recover damages for personal injuries, which he alleged that he had sustained, without fault on his part, while being carried as a passenger in the cars and on the railroad of the appellant, by and through the carelessness and negligence of its servants and agents.

The case having been put at issue was tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of seven thousand five hundred dollars; and the appellant’s motion for a new trial having been overruled, and its exception saved to this ruling, judgment was rendered on the verdict, from which said judgment this appeal is now here prosecuted.

All the questions presented for the decision of this court, in this case, arise under the alleged error of the circuit court, in overruling the appellant’s motion for a new trial. In this motion, thirty-two alleged causes for such new trial, consisting chiefly of supposed errors of law, occurring at the trial and excepted to, were assigned by the appellant; but, as many of these causes have not been even alluded to by

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its counsel in argument, we deem it unnecessary and unprofitable for us to set them out in this opinion. We will consider and decide such questions only as the appellant's counsel have presented and discussed in their able and exhaustive brief of this cause, and as have been properly saved in and by the record before us, in the order adopted by counsel. It is insisted by the appellant's attorneys, in argument, that the court erred in its sixth instruction to the jury trying the cause, which instruction reads as follows :

“6. When the fact has been established that a passenger in a railroad car has been injured, without his fault, by the car in which he was riding being thrown from the track and upset, the law will presume negligence on the part of the railroad company, unless the evidence shows there was not.”

It is claimed by the appellant's counsel that the doctrine of this instruction is now exploded, but we fail to see the matter in the light in which counsel have sought to present it. Indeed, it seems to us that the doctrine of the instruction is good law, and, as such, it has been approved and sanctioned by this court in several of its decisions. Thus, in the case of *The Jeffersonville R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228, in speaking of the ruling sometimes declared, that the fact that injury is suffered by a passenger while upon the company's train is *prima facie* evidence of the company's liability, it was said by this court, that “Ordinarily such fact should be regarded, at least, as *prima facie* evidence of negligence on the part of the company.” This is substantially the doctrine of the instruction complained of, and, so far as we are advised, its correctness has never been doubted or questioned by this court. *Sherlock v. Alling*, 44 Ind. 184. In some respects the case at bar is similar to the case of *Edgerton v. The New York, etc., R. R. Co.*, 39 N. Y. 227, decided by the Court of Appeals of New York, in 1868. In the case cited, the court said : “The evidence showed, that the car in which the plaintiff was riding, in part

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ran off the track, and was broken, by means of which the plaintiff was injured. This was *prima facie* evidence of negligence of the defendant. The latter not only had the entire control of the vehicle, but also of the track upon which it was run, and it owed a duty to the plaintiff to keep both in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish these results. Experience proves that, when the track and machinery are in this condition, and prudently operated, the trains will keep upon the track, and run thereon with entire safety to those on board. Whenever a car or train leaves the track, it proves, that either the track or machinery, or some other portion thereof, is not in a proper condition, or that the machinery is not properly operated, and presumptively proves, that the defendant, whose duty it is to keep the track and machinery in the proper condition, and to operate it with the necessary prudence and care, has, in some respect, violated this duty. It is true, that a bad state of the track or machinery may have resulted from the wrongful act of persons for whose conduct the defendant is not responsible, and the injury to the passenger may have resulted therefrom, and, in such a case, the company is not responsible, but such cases are extraordinary, and those guilty of perpetrating such acts are highly criminal; and, therefore, there is no presumption of the perpetration of such acts by others, and the company, if excusable upon this ground, must prove the facts establishing such excuse."

The doctrine of the instruction under consideration has been approved by the courts of last resort in divers other States, and by the Supreme Court of the United States. *Pittsburg, etc., R. W. Co. v. Thompson*, 56 Ill. 138; *Sullivan v. Philadelphia, etc., R. R. Co.*, 30 Pa. St. 234; *Baltimore, etc., R. R. Co. v. Worthington*, 21 Md. 275; *Yonge v. Kinney*, 28 Ga. 1; *Zemp v. W. & M. R. R. Co.*, 9 Rich.

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84; *New Orleans, etc., R. R. Co. v. Allbritton*, 38 Miss. 242; *Higgins v. Hannibal, etc., R. R. Co.*, 36 Mo. 418; *Stokes v. Saltonstall*, 13 Peters, 181. We are of the opinion that the court did not err in its sixth instruction to the jury trying the cause.

The appellant's counsel claim that the court erred in its refusal to give the jury the third instruction asked by the appellant, which reads as follows:

"3. The plaintiff having shown that the car was thrown from the track and road, and that he received an injury therefrom, this makes a *prima facie* case in favor of the plaintiff; but if the defendant has shown that the car was thrown off by reason of the breaking of a rail, sufficient in size and free from all defects, then the plaintiff can not recover without showing, by the preponderance of the evidence, that the break resulted from some defect in the construction and repair of the road or the machinery, or from negligence in operating the train, or from one or more or all of these causes."

In discussing this supposed error, it is conceded by the appellant's counsel, "that the main controversy between the parties was as to the cause of the breaking of the rail. The plaintiff claimed that the rail broke for want of sufficient support, the ties under the rail being rotten, and the rails not being well spiked down, etc. On the other hand, the defendant claimed that the ties under the rail were good, and the rail properly spiked, and the like, and the break was caused by the action of the frost alone. * * * * *

To say the least, on this issue there was a strong conflict of evidence." Under this view of the state of the evidence, which is certainly as favorable for the appellant as its learned counsel could make it, we are of the opinion that the court committed no error in its refusal to give the third instruction, above quoted, at the appellant's request. In the case as stated in said instruction, it was not sufficient, we think,

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for the appellant to show that the broken rail was "sufficient in size and free from all defects;" but, in order to relieve itself of the burthen of the issue in the case as stated, it was necessary that the appellant should have gone further, and have shown that such broken rail had been properly laid down and spiked, on sound and sufficient cross-ties.

The next point made by the appellant's counsel in argument is, that the court erred in refusing to give the first and sixth instructions asked by the appellant. These two instructions were as follows:

"1. If the caboose in question was good and sufficient for running with safety while upon the road of the defendant, the fact that it was unable to resist the crash when thrown from the track and road does not constitute a case of negligence against the defendant, for not providing a good and sufficient car or caboose for carrying passengers."

"6. If the road of the defendant was good and sufficient for safety, and if the car was thrown from the road, without any carelessness or neglect of the defendant, by the breaking of a rail, or from some hidden or unavoidable cause, and if the car in which the plaintiff was riding was sufficient and safe for running while it remained on the road, you can not find against the defendant on the ground that if the car had been stronger the injury might not have occurred, or not been so severe."

The court did not err, we think, in its refusal to give these two instructions, or either of them, to the jury trying the cause. It will not do to say, as a matter of law, that a railroad company has performed its full duty as a common carrier of passengers, when it has furnished for their carriage a car or caboose, which will run with safety while upon its road, but will be unable to resist the crash when thrown from its track. Yet this is substantially what the court was asked to tell the jury in each of the two instructions above

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quoted. The instructions do not state the law correctly, and the court very properly refused to give them.

The appellant's counsel next complain of the action of the court in amending and modifying the latter part of the seventh instruction, asked by the appellant, and in giving the instruction as amended and modified. We set out the part of said instruction, to which the complaint of counsel applies, as follows:

“For instance, if there were rotten and defective ties, defective chairs and loose spikes, at other points in the road, such facts, if proven, would not make a case of negligence at the point of the accident, nor render the defendant liable for the injury, unless [such defective condition was shown at the point of the accident, and] it was further shown that such defective condition caused *or materially contributed to* the accident.”

The amendment and modification of the foregoing part of the seventh instruction by the court, consisted in striking out therefrom the words which we have enclosed within brackets, and in inserting therein the words which we have italicized, at the place where they now appear. In their brief of this cause the appellant's counsel say that the plain and obvious meaning of the seventh instruction, as asked, was this: “That the jury had no right to infer a defective condition of the road at the place of the accident, from proof of a defective condition at other points. The instruction as given said to the jury, in effect, simply this: that proof of defects in the road at other points would render the defendant liable, if such defects caused or contributed to the accident. This was correct, but it did not cover the point asked.” We agree with counsel, that the instruction, as amended, modified and given, was correct; and we are of the opinion that the court did not err, either in refusing to give the instruction as asked, or in amending and modifying the same in the manner indicated, and as it was given.

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Appellant's counsel say, in their brief, that the court erred in refusing to give the second instruction asked by the defendant; but they have failed to point out the supposed error therein, or to discuss any question thereby presented. Under the settled practice of this court, this alleged error must, therefore, be regarded as waived.

The court, at the appellant's request, submitted to the jury trying the cause, the following question of fact:

"5. At what time (giving the hour and minute) did the wreck occur, on the 23d of March, 1877, on the road of the defendant?"

The jury first answered this question as follows: "From the evidence adduced, we can not so accurately answer." But this answer having been objected to, the jury retired under the direction of the court, and afterward returned this answer to the question: "From the nature of the question, we can not so positively answer." Over the appellant's objection, the second answer was accepted by the court, and the jury were discharged from the further consideration of the question. It is claimed by the appellant's counsel that this action of the court was erroneous, but we can not so regard it. On this point counsel say: "Two witnesses at least testified that the wreck occurred between 11.40 and 11.45 A. M." It is certain, we think, that the jury could not, from the evidence of these two witnesses, give "the hour and minute" at which the wreck occurred; and it was the precise time to a minute, and not an approximation of the time, which the question required the jury to give in their answer thereto. It seems to us that each of the answers of the jury was a sufficient answer to the question submitted to them, under the evidence as stated by the appellant's counsel. The question was so framed that it might well have been understood by an accurate and liberal minded jury to require from them a direct and positive answer to a minute, or none at all; and as they could not,

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under the evidence as stated by counsel, answer to a minute, their answers were that they could not answer so accurately or so positively as the question seemed to require them to answer. We have no doubt that the jury answered the question conscientiously; and the action of the court, in discharging them from the further consideration of the question, was right and proper, as it seems to us.

The only other matter complained of by the appellant's counsel is mentioned in their brief in the following language:

“We further submit that a new trial should have been granted for each of the 28th, 29th, 30th and 32d reasons assigned for a new trial. But as this brief is already too long, we must content ourselves with simply calling the attention of the court to these reasons.” This is all that counsel have said on the question presented. Under the practice of this court, and with all proper respect for the learned counsel, we think that we must content ourselves with simply saying that the questions arising under these reasons for a new trial, if there were any such questions properly saved, must be regarded as waived.

We find no error in the record of this cause for which the judgment below can or ought to be reversed.

The judgment is affirmed, at the appellant's costs.

Petition for a rehearing overruled.

No. 7607.

BOWEN v. BOWEN.

CHANGE OF VENUE. — *Affidavit.* — *Statute Construed.* — Under the third clause of section 207 of the code, as amended by the act of March 5th, 1877, Acts 1877. Reg. Sess., p. 103, the affidavit of the defendant for a change of venue must specifically set forth the defence. The general

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statement therein, "that the affiant has a good and meritorious defence to said action, as set forth in his answer," is insufficient.

JURY.—Right to Poll.—Question Asked.—Verdict.—The right to poll the jury, in civil actions, is expressly conferred by statute, but it must be restricted to the single question to each juror, "Is this your verdict?" and not "Is this your verdict, and are you still satisfied with it?"

EVIDENCE.—Witness.—Value of Services.—It is competent for a witness to state the value of another's services, where he has knowledge of the matter in controversy, and is acquainted with the value of services such as those rendered.

From the Carroll Circuit Court.

J. Applegate, J. R. Coffroth and C. B. Stuart, for appellant.

ELLIOTT, J.—The appellee's complaint is for work and labor performed by him for the appellant. The answer of the appellant is the general denial and payment. To the plea of payment a reply in denial was filed.

The only questions which counsel argue are those presented by the assignment based upon the ruling denying a new trial.

An affidavit was made by appellant for a change of venue from the county. The court refused to grant the change, and in this did right. The affidavit was radically defective, for the reason that it did not specifically set forth the defence of appellant. A general statement is made, "that the affiant has a good and meritorious defence to said action, as set forth in his answer." The statute requires that the "applicant shall further show by his affidavit that he has a good and meritorious * * defence, which shall be specifically set forth therein." Acts 1877, p. 103. This provision is clear and explicit, and a party is not entitled to a change of venue unless his affidavit specifically states his defence. To permit a party to evade the statute by mere general references would be to seriously impair, if not to altogether destroy, the beneficial effect of the statute.

The appellant asked to have the jury polled, and his request was granted. The court instructed the jurors, that, as

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each name was called he should, if the verdict was his, respond to the question asked him, "Yes;" if it was not his verdict, he should respond to the question propounded, "No." The appellant requested the court to allow each juror to be asked, "Is this your verdict, and are you still satisfied with it?"

The right to poll the jury in civil actions is expressly conferred by statute. 2 R. S. 1876, p. 170. The common law did not recognize the right as one which a party could demand as matter of right, but regarded it rather as a privilege which might be granted or withheld, at the discretion of the trial court. *Ropps v. Barker*, 4 Pick. 239; *Commonwealth v. Roby*, 12 Pick. 496; *Commonwealth v. Costley*, 118 Mass. 1; *The State v. Wise*, 7 Rich. 412.

As our statute grants the right to poll the jury, we are bound to examine and determine the question made by the ruling refusing the appellant the right to propound to each juror the interrogatory, "Is this your verdict, and are you still satisfied with it?"

Counsel have not furnished us with any authority in support of their position, and we have found none. We do, however, find authority declaring a different doctrine. In *The State v. Bogain*, 12 La. An. 264, it was held that "The object of polling the jury is to ascertain whether the verdict, as announced by the foreman, was concurred in by all the jurors, and the inquiry should be restricted to the question, 'Is this your verdict?'" The doctrine of the case cited has received the sanction of one of our ablest and most philosophical text-writers. 1 Bishop Crim. Proced., sec. 1003. In *Labar v. Koplin*, 4 N. Y. 546, the language of the court is very like that used in the Louisiana case. In the case last cited, the Court of Appeals said: "The object of polling a jury is to ascertain if the verdict which has just been presented or announced by their foreman is their verdict, or in other words if they still agree to it; not to ask them what their

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verdict means, nor to question them as to their intention in finding it. This is performed by the clerk, who, as he calls over the list of jurors, asks them one by one, or by the poll, the simple question, 'Is this your verdict?' This question requires but one answer, and still embraces all the legitimate objects of polling a jury. The party has no right to dictate the manner in which a jury shall be polled, or to insist on any other question being put to them than the simple one to ascertain whether they agree to the verdict as presented."

We are satisfied that the rule declared by these cases is a sound and practical one. The question, "Is this your verdict?" asks for all the information a party is entitled to receive, and affords each juror ample opportunity to dissent, if he is dissatisfied. It is better to restrict the right to interrogate the jury to the single question stated; for, if a party be permitted to frame other questions, great abuses are very likely to result, and the practice to vary with each particular case. Wrong may be prevented by restricting the right to interrogate the jury as we have indicated, and no harm can be done the party, because the question suggested calls for an answer conveying all the information to which he has any right.

Complaint is made of the ruling allowing the appellee to ask certain witnesses the following question: "Taking the services you saw your brother rendering for the defendant,—such services as you saw him doing there,—what would you say his services were reasonably worth per month?" There was no error in this ruling. The witness is simply asked to state the value of another's services, and in this there is no invasion of the province of the jury. The principle which supports this ruling is precisely the same as that which entitles a plaintiff, in an action to recover the value of a horse, to ask a competent witness to state such value. It is always proper to prove values by witnesses who have knowledge of the matter in controversy and a proper ac-

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quaintance with general values of articles or things of like character. *Johnson v. Thompson*, 72 Ind. 167. The witness, in the course of his testimony, had fully stated what work he had seen the appellee do, and had shown himself acquainted with its character.

The witnesses who fixed an estimate upon the value of the services were shown to have some acquaintance with the value of services such as those rendered by the appellee. Where a witness shows himself acquainted with values, his testimony is competent. The weight of such testimony depends, in a great degree, upon the extent of the witnesses' acquaintance with such matters; but its competency is not to be determined by any such standard.

It is insisted that the court erred in refusing to permit appellant to prove what induced him to buy the hardware store in which appellee's services were performed. There was no error in this ruling.

Judgment affirmed.

Opinion filed at November Term, 1880.

Petition for a rehearing overruled at May Term, 1881.

 No. 7400.

TRAMMEL v. CHIPMAN.

ASSIGNMENT OF ERROR.—*Sufficiency of Complaint.*—*Separate Paragraphs.*—*Practice.*—*Supreme Court.*—*Motion.*—The sufficiency of a complaint, as a whole, may be assigned as error in the Supreme Court, and so the sufficiency of each paragraph be brought under review, but separate assignments on the respective paragraphs severally can not be made. An assignment of error, to be good, must be such, if true, as to require the reversal of the judgment; but, if any paragraph of a complaint is good, the sufficiency of other paragraphs can not be questioned, either by a motion in arrest or by an assignment of error that it does not state facts sufficient.

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SAME.—The assignment of errors is, in effect, the appellant's complaint in the Supreme Court, and, like the paragraphs of a complaint, each separate specification of error must in itself state a sufficient cause for reversing the judgment.

CONTRACT.—*Correction of.*—*Mutual Mistake.*—*Complaint.*—*Verdict.*—Where the complaint upon a contract alleges a mutual mistake as to the terms thereof, and shows by its averments exactly what figures the parties agreed upon and intended to have inserted instead of those written therein, it is good on demurrer, and certainly sufficient after verdict.

SAME.—*Conditional Promissory Note.*—*Demand.*—No demand is necessary before suit, upon a promissory note executed payable on condition that the maker should be unable to show that he had forwarded to the payee a certain sum on account of revenue taxes collected by the maker as deputy of the payee.

PRACTICE.—*Answers to Interrogatories.*—Where the answers to interrogatories show that the jury found for the plaintiff upon a good paragraph of complaint, the Supreme Court will not consider the sufficiency of the other paragraphs thereof.

SAME.—*Identical Paragraphs of Complaint.*—*Refusal to compel Election.*—*Harmless Error.*—No available error is committed by the refusal of the trial court to compel a plaintiff to elect between two paragraphs of his complaint, though they be word for word the same, and admitted to be for the same cause of action.

From the Huntington Circuit Court.

J. R. Coffroth, T. L. Lucas and W. H. Trammel, for appellant.

M. A. Chipman, J. C. Branyan and C. W. Watkins, for appellee.

WOODS, J.—Complaint in three paragraphs, by the appellee against the appellant; issues of fact; verdict and judgment for the plaintiff, and appeal by the defendant.

The first three assignments of error bring separately in question the sufficiency of the facts averred in the respective paragraphs of the complaint to constitute a cause of action. The sufficiency of the complaint as a whole may be assigned as error, and so the sufficiency of each paragraph be brought under review, but separate assignments on the respective paragraphs severally can not be made. An assignment, to be good, must be such, if true, as to require

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the reversal of the judgment; but, if any paragraph of a complaint is good, the sufficiency of other paragraphs can not be questioned, either by a motion in arrest or by an assignment of error that it does not state facts sufficient. Though error be assigned separately upon each of several paragraphs of a complaint, it can not be determined upon any single assignment, that the judgment ought to be reversed; and, though an examination, if made, might lead to the conclusion that each paragraph of the pleading was fatally defective, the judgment must still be affirmed, because there is no single assignment which presents the whole question. A number of defective assignments can not be combined to constitute a good one, any more than several insufficient paragraphs of a complaint can be deemed to make a good complaint. The assignment of errors is, in effect, the appellant's complaint in this court, and, like the paragraphs of a complaint, each separate specification must in itself state a sufficient cause for reversing the judgment. On this subject, see *Higgins v. Kendall*, 73 Ind. 522, and cases there cited; *McCallister v. Mount*, 73 Ind. 559.

The eighth assignment, however, is upon the whole complaint, and requires a decision whether any paragraph is sufficient. The first and second are substantially the same, and are based on the following instrument, to wit:

“HUNTINGTON, IND., April 14th, 1869.

“On or before three months after date, I promise to pay to the order of D. C. Chipman the sum of two hundred and ninety-four and $\frac{33}{100}$ dollars, without relief from valuation laws, upon the following conditions: That, if I am able to show that, as deputy collector of Huntington county, I forwarded to the said Chipman the sum of \$48,968.64 for internal revenue taxes, then this note is to be void, else to remain in full force for any amount not exceeding \$294.33.

“Witness my hand and seal.

(Signed) “WM. H. TRAMMEL.”

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These paragraphs each show that from July 15th, 1862, to the 30th day of November, 1866, the plaintiff had been the collector of internal revenue for the Eleventh Revenue District of Indiana, and that the defendant had been his deputy collector for the county of Huntington; that the defendant had failed to pay over to the plaintiff the sum of \$300, collected by him as such deputy during the month of February, 1865, for which sum, less his commission thereon, he executed to the plaintiff said note; that there was a mistake in the drawing of said instrument, in this, that it was intended and agreed by the parties that in the conditional clause of the note it should read “\$49,232.45,” instead of “\$48,968.64,” as the same is written.

The chief objection urged against these paragraphs of the complaint is, that they do not aver such a mutual mistake as to entitle the plaintiff to a correction of the contract; and in support of the objection the following cases are cited: *Baldwin v. Kerlin*, 46 Ind. 426; *Barnes v. Bartlett*, 47 Ind. 98; *Nicholson v. Caress*, 59 Ind. 39; *Easter v. Severin*, 64 Ind. 375; *Schoonover v. Dougherty*, 65 Ind. 463. The averments show exactly what figures the parties agreed and intended to have inserted, and that by mistake other figures were inserted instead. This would be good upon demurrer, and is certainly sufficient after verdict. *The Indianapolis, etc., R. R. Co. v. McCaffery*, 72 Ind. 294.

No demand was necessary before bringing suit on this contract. The answers to interrogatories show that the jury found for the plaintiff upon the first and second paragraphs of the complaint, and, these being good, we need not consider whether or not the third was good. *The Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261.

The overruling of the appellant's motion for a new trial is also assigned for error, and under this head it is insisted that the alleged mistake in the contract is not proven by sufficient evidence. It was clearly shown that the total sum

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remitted by the appellant to the appellee, or paid over and accounted for was \$48,968.64; that the collections made by the appellant in February, 1865, were \$851.08, while only \$551.08 seemed to have been accounted for and remitted. This deficiency was discovered by the parties, and the instrument sued on was executed therefor, but as appellant was insisting that remittances had been made covering the apparent deficiency, the conditional clause was inserted, the intention of the parties being to insert in said clause the total sum which the appellant ought to have accounted for, including the difference between \$851.08 and \$551.08 aforementioned, about which there was no dispute, and which, added to the sum actually accounted for by the appellant, makes the total which should have been accounted for, the sum of \$49,268.64. While the evidence does not show that these figures were mentioned or agreed on between the parties as expressing the sum which should be inserted in the contract, it does show that they did intend to insert therein the actual sum total for which the appellant was accountable, but, instead of inserting the proper amount, the appellant, who drew the instrument, inserted, presumably by mistake, the amount which he had actually already paid over and had credit for, thereby making the contract an absurd nullity. The jury, by its answers to interrogatories, have expressly found the mistake alleged, showing that their general verdict for the plaintiff rests on the first or second paragraph of the complaint, and, upon the evidence as set forth in the record, we should not be justified in disturbing their conclusion.

There was no available error in the refusal of the court to compel the plaintiff to elect between the first and second paragraphs of the complaint. Had they been word for word the same, and contained an express admission that each was for the same cause of action set forth in the other, we could not reverse the judgment on that account, because the mer-

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its of the case would not be involved. On such questions the rulings of the circuit court must be deemed final.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

No: 7231.

HOSFORD v. JOHNSON ET AL.

FORECLOSURE.—Senior and Junior Mortgages.—The rights of a junior incumbrancer are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding.

SAME.—Redemption Money.—Terms of Mortgage.—Whole Mortgage Debt must be Paid.—The amount of redemption money to which a purchaser at a sale upon foreclosure of a senior mortgage is entitled depends on the terms of the mortgage, and not on the foreclosure judgment, nor on the amount he paid at the sheriff's sale. Junior incumbrancers can not redeem by paying the sum of the purchase-money, with interest, but they must pay the whole mortgage debt.

SAME.—Damages.—Attorney's Fees.—Offer to Redeem.—Where a mortgage provides for attorney's fees, if suit be brought by reason of the default of the mortgagor, they become a part of the damages which the mortgagee is entitled to recover, and an incident of the principal debt; and whether such suit be brought on the notes alone, or on the notes and mortgage, his right to recover attorney's fees accrues, and they become a part of the mortgage debt, and junior mortgagees are bound to include the amount of such fees in their offer to redeem.

SAME.—Insurance Premiums.—Where it is a part of the contract of a mortgagor, and a condition of the mortgage, that he shall keep the premises insured in a certain sum for the benefit of the mortgagee, charges for premiums paid by him for such insurance, which the mortgagor has neglected to obtain, are allowable as a part of the redemption money.

SAME.—Costs.—Junior incumbrancers are not required to pay the costs of the foreclosure suit of their senior incumbrancer as a part of the redemption money.

SAME.—Mortgagee in Possession.—Rental Value.—Necessary Repairs.—A mortgagee in possession is chargeable with the rental value of the property, and, on a redemption thereof, he is entitled to be reimbursed for all necessary repairs made on the mortgaged premises.

74	479
126	430
127	89
74	479
126	80
126	365
74	479
140	150
74	479
144	72
74	479
148	32
74	479
153	535
74	479
154	361
74	479
166	370

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ESTOPPEL.—*Necessary Element.*—*Knowledge of Legal Rights.*—A paragraph of answer charging in effect only an agreement of senior and junior incumbrancers, that they would not bid against each other at their respective sales, without alleging that any facts were known to the plaintiff that were not also known to the defendant, discloses no element of an estoppel by conduct against a plaintiff, to maintain an action for redemption. One party is as much bound as the other to a knowledge of their respective legal rights.

PLEADING.—*Cross Complaint for Foreclosure.*—*Demurrer.*—A cross complaint seeking a foreclosure of a mortgage is insufficient upon demurrer, when neither the mortgage nor a copy is filed therewith.

From the Vigo Circuit Court.

J. G. Williams, S. C. Davis and S. B. Davis, for appellant.

M. Winfield, for appellees.

NEWCOMB, C.—The Atlas Insurance Company held a mortgage on certain real estate in Vigo county, and Johnson and Finch held a junior mortgage on the same property. The Atlas Company foreclosed its mortgage, but did not make Johnson and Finch defendants to the action, nor did the latter appear to it. A separate foreclosure suit was instituted by Johnson and Finch, and their mortgage was foreclosed. The appellant, Hosford, purchased the mortgaged premises at the sheriff's sale on the senior mortgage, bidding therefor the full amount of the judgment and costs. On the same day, the property was also sold on the foreclosure judgment of the appellees, they being the purchasers. After the year for the statutory redemption had expired, deeds were executed by the sheriff to the respective purchasers. Johnson and Finch then tendered to Hosford the amount of principal and interest of the Atlas Company's mortgage, as a redemption thereof. The tender was refused, and they then filed their complaint to redeem, alleging the tender and refusal. Hosford demurred to the complaint, but his demurrer was overruled. He then answered in two paragraphs, and also filed a cross complaint, praying a fore-

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closure of the Atlas Company's mortgage, as against Johnson and Finch. Demurrers were sustained to both paragraphs of the answer and to the cross complaint, and there was final judgment on demurrer in favor of the appellees, to the effect that they were entitled to redeem, on payment of the principal and interest of the senior mortgage; that the amount found due should be paid into court within fifteen days, and that, on such payment being made, the title of plaintiffs in said property be quieted, and that Hosford should be forever estopped from setting up any title thereto.

The principal contention between the parties is, whether Johnson and Finch, in order to redeem, were required to pay, in addition to the principal and interest of the senior mortgage, certain sums included in the foreclosure judgment for attorney's fees and for insurance premiums paid by the Atlas Company. Hosford also claimed that they must pay the costs of the foreclosure proceeding, and that he ought to be reimbursed for the cost of a new roof he put on the building on the mortgaged premises, after he took possession, and for certain expenses he had incurred in hiring a watchman to take care of said building.

The doctrine may be regarded as settled in this State, that the rights of a junior incumbrancer are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding. *Proctor v. Baker*, 15 Ind. 178; *Murdock v. Ford*, 17 Ind. 52; *Holmes v. Bybee*, 34 Ind. 262; *Hasselman v. McKernan*, 50 Ind. 441.

This being the case, the amount of redemption money to which Hosford was entitled depended on the terms of the mortgage, and not on the foreclosure judgment, nor on the amount he paid at the sheriff's sale. Had he purchased the property for less than the amount due upon the mortgage, the junior incumbrancers could not redeem by paying the sum of his purchase-money, with interest, but they would be re-

Hosford v. Johnson *et al.*

quired to pay the whole mortgage debt. *Collins v. Riggs*, 14 Wal. 491.

The complaint stated the date, amount and rate of interest of the Atlas Company's mortgage. This was admitted by the answer, but in the answer it was averred that the mortgage also provided that the mortgagor should keep the buildings on the premises insured in the sum of \$5,000, for the benefit of the mortgagee, which he had failed to do, and that the latter, in consequence of such failure, had paid \$500 in premiums for such insurance, which was allowed and included in the foreclosure judgment. Also that the notes secured by the mortgage provided that in case of suit the maker would pay five per cent. attorney's fees, and that in the foreclosure judgment such fees were included to the amount of \$200. The appellees contend that, inasmuch as they were not parties to the action in which the attorney's fees were recovered, and their rights as junior incumbrancers were not impaired or affected by the judgment in that case, such fees were not a valid claim against them. It is true that they were not liable to pay these attorney's fees because of their allowance in the judgment rendered in favor of the Atlas Company, for that judgment had no force as against them; but they were required to pay every claim secured by the mortgage. By the terms of the mortgage, the attorney's fees became a part of the mortgage debt in case suit should be brought by reason of the default of the mortgagor. They were a part of the damages the mortgagee was entitled to recover, and an incident of the principal debt. *Smiley v. Meir*, 47 Ind. 559; *Josselyn v. Edwards*, 57 Ind. 212. Whenever the senior mortgagee instituted an action to recover the debt secured by the mortgage, whether such action were upon the notes alone, or upon the notes and mortgage for a foreclosure, the right to recover the attorney's fees accrued and became a part of the mortgage debt, and for this

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reason we hold that the junior mortgagees were bound to include the amount of such fees in their offer to redeem.

As to the insurance premiums, the appellees argue that the agreement to keep the property insured was merely a personal covenant of the mortgagor; that the mortgage did not in terms provide that if the mortgagee should pay such premiums, on the failure of the mortgagor to do so, the amount so paid should be deemed a part of the mortgage debt. There is no copy of the mortgage in the record. The allegation of the answer on this point is as follows: "It was understood and agreed, and so stated in the mortgage, that said Tuttle" (the mortgagor) "would keep said building insured, and would pay the premiums for such insurance."

In Jones on Mortgages, sec. 1,135, it is said: "Where it is part of the contract of the mortgagor, and a condition of the mortgage, that he shall keep the premises insured in a certain sum for the benefit of the mortgagee, charges for premiums paid by him for such insurance, which the mortgagor has neglected to obtain, are allowed." For authority the author refers to *Harper v. Ely*, 70 Ill. 581; *Fowley v. Palmer*, 5 Gray, 549; and *Montague v. Boston, etc., R. R. Co.*, 124 Mass. 242.

In the Illinois case, it was held that a mortgagee in possession would be allowed, as against rents collected by him, the amount paid by him for insurance when the mortgage required the mortgagor to keep the building on the property insured; and the case in 124th Massachusetts was of the same character. In *Fowley v. Palmer*, *supra*, it is stated that it was a condition of the mortgage, that the mortgagor should keep the buildings insured for the benefit of the mortgagee, from which we infer that the mortgage was so framed as to make the premiums that might be paid by the mortgagee a part of the mortgage debt, in case the mortgagor failed to insure.

From the averment in the answer, we can not say that the

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court below erred in holding that the insurance premiums were not secured by the mortgage. The appellees were not required to pay the costs of the foreclosure suit. Jones on Mortgages, sec. 1,084; *Gage v. Brewster*, 31 N. Y. 218; *Moore v. Cord*, 14 Wis. 213.

The complaint charged that Hosford had received \$500 in rents after taking possession of the property in controversy. The answer admits the possession, but denies the receipt of any rents, and avers that the use and occupation were of no value. In this connection a claim is made for compensation for a new roof, put upon the building by the appellant, and for money alleged to have been paid by him to a watchman to protect the premises from fire; "all of which," it is averred, "was absolutely necessary for the preservation and protection of said property."

A mortgagee in possession is chargeable with the rental value of the property, and on a redemption of his mortgage he is entitled to be reimbursed for all necessary repairs made on the mortgaged premises. See Jones on Mortgages, sec. 1129, and the numerous authorities there cited.

The claim of appellant to reimbursement for the services of a watchman is not discussed in his brief, and we therefore treat it as waived.

The second paragraph of the answer sets up matter of supposed estoppel. It alleges that on the day of the sheriff's sales appellant exhibited to the appellees a statement of the amount due on the Atlas Company's judgment for principal, interest and costs, and, before said property was offered for sale, it was agreed between them that the appellant should buy the property under the foreclosure of the Atlas Company, and that the appellees would buy under their own judgment; that, pursuant to such understanding, the agent of the appellees attended said sale in company with the appellant, and, when the property was offered on the Atlas Company's judgment, appellant bid the amount

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due thereon and the costs ; that the property was then offered on the decree in favor of the appellees, and it was purchased by them, through said agent, for the amount due them, including costs ; that said agent stood by and saw appellant purchase said property, and knew that the items of insurance and attorney's fees were included in said judgment, and knew also that Johnson and Finch had not been concluded by said judgment, because they were not parties thereto ; and, knowing all said facts, said agent kept silent and did not dispute the right of said insurance company to recover said fees and insurance premiums in their foreclosure, and gave no notice of appellees' claim that they would not be bound by said judgment ; but, on the contrary, by said understanding, the appellees, by their agent, purchased said realty under their judgment, subject to the senior lien of said insurance company, and that appellant, relying on the acquiescence of these plaintiffs in said judgment and the sale thereunder, paid the amount of his bid and never received any notice of the plaintiffs' claim, as set up in the complaint, until just before the commencement of the suit. It is further averred that the plaintiffs below had notice of the judgment and proceedings under which the defendant purchased, as soon as the sheriff advertised the property for sale.

We fail to discover an estoppel in the matters set forth in this paragraph. The only agreement charged is, in effect, that the parties would not bid against each other at the respective sales. It is not alleged that any facts were known to the plaintiffs that were not also known to the defendant ; and, as to the legal rights of the parties, one was as much bound to a knowledge of them as the other.

To constitute an estoppel by conduct, there must be :

1. A representation or concealment of material facts :
2. The representation must have been made with knowledge of the facts.

Sackett v. The State, ex rel. Foreman.

3. The party to whom it was made must have been ignorant of the truth of the matter.

4. It must have been made with the intention that the other party should act upon it.

5. The other party must have been induced to act upon it. Bigelow Estoppel, 437 ; Fletcher v. Holmes, 25 Ind. 458 ; The Greensburgh, etc., Turnpike Co. v. Sidener, 40 Ind. 424.

The demurrer to appellant's cross complaint was properly sustained. It sought a foreclosure of the Atlas Company's mortgage, but neither the mortgage nor a copy thereof was filed with the cross complaint.

For error of the court below, in sustaining the demurrer to first paragraph of the answer of the defendant, Hosford, the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and it is hereby, in all things reversed, at the costs of the appellees, Johnson and Finch ; and that said cause be remanded, with instructions to the Vigo Circuit Court to overrule the demurrer of the plaintiffs below to the first paragraph of the answer of the defendant, Hosford, and for further proceedings in accordance with said opinion.

Petition for a rehearing overruled.

74	486
131	393
131	518
74	486
148	566
148	568
74	486
154	206
154	387
74	486
159	124
74	486
160	486
74	486
162	73

No. 9302.

SACKETT v. THE STATE, EX REL. FOREMAN.

SCHOOL TRUSTEE.—Vacancy.—Appointee can Hold until Successor is Elected.—Cities and Towns.—A school trustee, appointed to fill a vacancy in the office of school trustee of a city, under the act of March 12th. 1875, Acts 1875, Reg. Sess., p. 135, is entitled, by force of the third section of the fifteenth article of the constitution of the State, to hold such office until a successor is elected and qualified.

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SAME.—*Election.—Term of Office.—Statute Construed.*—By section 1 of said act, *supra*, it was intended to create in each town and city of the State a board of school trustees, composed of three members, one to be elected and take his office each year, and each to hold office for three years; but, in so far as said section prescribes the time when the election shall be held, it is directory only.

SAME.—*Election to be Held Annually in June, but Valid Election may be Held on Subsequent Day.—Case Distinguished.*—Under such section, successive annual elections for a school trustee should be held at the first regular meeting of the council in June; but this does not limit the power of the common council of a city to elect only on such day, and a valid election may be had upon a subsequent day. *The State, ex rel. Dickerson, v. Harrison*, 67 Ind. 71, distinguished.

From the Floyd Circuit Court.

A. Dowling, for appellant.

J. H. Stotsenburg and *J. S. Frazer*, for appellee.

WOODS, J.—Proceedings upon an information in the nature of a *quo warranto*, brought for the purpose of determining between the relator and the appellant, which was entitled to the office of school trustee of the city of New Albany. Error is assigned upon the overruling of the appellant's demurrer to the information. The question to be decided, however, is one of statutory construction entirely, and requires, in order to be understood, only an outline of the facts out of which the litigation has arisen.

Some time before the month of June, 1880, one of the school trustees of New Albany, whose term of office would have expired on the first Monday of that month, had resigned the office, and the appellant, Sackett, had been duly appointed to fill the vacancy. At a regular session of the common council of the city, held on the 19th of July, 1880, the relator was elected such trustee in the place and as the successor of the appellant, and qualified and demanded the office, but the appellant continued to hold. No election of such trustee was made at the first regular meeting of the common council in June, 1880, or at a subsequent meeting, before the time of the relator's election, either because a

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quorum of the council was not present, or because the council was unable to make an election at such meetings.

The act approved March 12th, 1875, Acts 1875, Reg. Sess., p. 135, sec. 1, provides that "The common council of each city, and the board of trustees of each incorporated town of this State, shall, at their first regular meeting in the month of June, elect three school trustees who shall hold their office one, two and three years respectively, as said trustees shall determine by lot at the time of their organization, and annually thereafter shall elect one school trustee who shall hold his office for three years; * * * All vacancies that may occur in said board of school trustees shall be filled by the common council of the city or board of trustees of the town, but such election to fill a vacancy shall only be for the unexpired term."

By force of the third section of the fifteenth article of the constitution of the State, the appellant, though appointed to fill only an unexpired term, was entitled to hold until his successor had been elected and qualified.

The case, therefore, presents this question: The city council having failed to elect a school trustee at its first regular meeting in June, could it lawfully elect in July?

Counsel for the appellant has stated his position in the following language: "The words of this statute are peremptory, definite and exclusive. A day certain is fixed for the first election, and every subsequent election is required to be held annually thereafter. But an election held upon any other day than the day of the first regular meeting in the month of June in each year, would not meet the requirement of the statute. No discretion is allowed to the common council. No provision is made for any postponement or adjournment of the election for any cause whatever, and it can not be fairly inferred, from the language of the act, that the Legislature contemplated that an election might be held on any other day than that fixed, appointed and de-

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clared by the law. * * * The failure of the common council to elect at the time appointed by the statute suspended their power of election until the recurrence of the election day in the following year.”

The counsel for the appellee on the contrary insist that, under the law, the duty to elect is imperative, and that, in so far as it prescribes the time when the election shall be had, the statute is directory only.

We concur in this position. The opposite view leads directly and necessarily to results which it is impossible to believe could have been intended by the Legislature, and which an examination of the provisions of the law will plainly show were not intended. A failure to elect at the appointed time, as may well have been conceived, is liable to happen from many causes. A quorum of the common council may be wanting on account of accident, or of sickness, or of absence of its members; and, when a quorum is not wanting, a tie vote may defeat a choice. But if it be held that a failure to elect suspends the power to elect until the recurrence of the prescribed day, it is easy to see that corrupt motives and influences may intervene for the purpose of preventing an election at the appointed time. If reasonably possible to be escaped, an interpretation of the law which promotes or tends to such results should not be adopted.

Returning to the provisions of the enactment under consideration, it may be safely affirmed that the legislative intent was to create in each town and city of the State a board of school trustees, composed of three members, one to be elected and take his office each year, and each to hold office for three years. This is the manifest general purpose of the act, with reference to which particular clauses or provisions should be construed.

It is true, as suggested by counsel for the appellee, that it is only the first election of these trustees which is expressly fixed for the first regular meeting in the month of

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June, and that subsequent elections are only required to be had "annually thereafter," which, without violence to the language, may be interpreted to mean "once in each year thereafter." We do not doubt, however, that the proper construction is, that the successive annual elections should be held at the first regular meeting of the council in June. But this should not be deemed to be a limitation on the power to elect, which, if necessary, may as well be exercised at a subsequent time. If the power can not be exercised except on the day named in the statute, then a successor to the appellant can not be chosen before June, 1883; and in every case of failure to elect at the first meeting in June, the incumbent may hold over for another full term of three years. The council "annually thereafter shall elect one school trustee, who shall hold his office for three years," says the law, and, if as counsel claims, this language is "peremptory, definite and exclusive," there can be an election of but one trustee each year, and as one vacancy occurs regularly each year, that alone can be filled; and even if it be conceded that more than one may be elected at a time, there still remains the provision that the trustee so elected shall hold his office for three years; and so it will result that instead of one trustee going out and his successor coming in annually, there may be two trustees and even the entire board to be elected at one time, which would frustrate entirely the design of the law in this important respect. There are, besides, no restrictive or negative words in the act which forbid an election on the next day, week or month, after the day named therefor. Our conclusion that such an election may be valid, though had after the appointed time, is not only supported by sound reason and the demands of public policy, but is in accordance with the current of authority.

Says Chancellor KENT, 1 Com. 461: "The intention of the law-giver is to be deduced from a view of the whole, and of every part of a statute, taken and compared together. The

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real intention, when accurately ascertained, will always prevail over the literal sense of terms.” And to the same effect are *Lindley v. Braxton*, 27 Ind. 56; *Zorger v. The City of Greensburgh*, 60 Ind. 1.

In *The People v. Allen*, 6 Wend. 486, this language was used: “Where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered *directory* merely, unless the nature of the act to be performed, or the language used by the Legislature, shows that the designation of the time was intended as a limitation of the power of the officer.” This statement of the law has twice before, at least, been quoted with approval by this court. *Nave v. King*, 27 Ind. 356; *Jones v. Carnahan*, 63 Ind. 229. See, also, *The Mayor, etc., v. Weems*, 5 Ind. 547; *Black v. Weathers*, 26 Ind. 242; *Dillon Munic. Corp.*, 3d ed., sec. 839; *Dwarris Statutes*, pp. 221, 228, and note; *Smith Const. Constr.*, secs. 670–674; *Sedgwick Const. Law*, 316–328; *The People v. The Trustees, etc.*, 51 Ill. 149; *Webster v. French*, 12 Ill. 302; *State v. Smith*, 22 Minn. 218; *State, ex rel., v. Harris*, 17 Ohio St. 608; *Pond v. Negus*, 3 Mass. 230; *Williams v. School District, etc.*, 21 Pick. 75; *City of Lowell v. Hadley*, 8 Met. 180; *Ex Parte Heath*, 3 Hill, 42; *Gale v. Mead*, 2 Den. 160; *The People v. Holley*, 12 Wend. 481; *Jackson v. Young*, 5 Cow. 269; *Colt v. Eves*, 12 Conn. 242; *Savage v. Walshe*, 26 Ala. 619; *Rex v. Loxdale*, 1 Burr. 445.

The case of *The State, ex rel. Dickerson, v. Harrison*, 67 Ind. 71, is cited in support of the appellant’s position, but it is so far distinguishable from this case that we need not consider whether it was well decided. The power to appoint a county superintendent of schools was involved in that case. The township trustees of the county composed the body in which was lodged the appointing power, and were required to meet on a day named, and biennially thereafter, for the purpose of making the appointment; and, for the purpose

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of filling a vacancy, they were authorized to meet on notice from the county auditor. Other than under these provisions the appointing body had no existence or express power to assemble. In the case referred to, the trustees met on the day fixed by law, but, failing to elect a superintendent, adjourned to the next day, when, no election being effected, they adjourned without day. They were afterward called together by the auditor, and made an election, which this court held invalid. It is plain that there was no vacancy to fill, because the incumbent under the constitution was holding over. There was, therefore, no authority in the letter of the law for the auditor's notice, and, without that notice, no warrant for the trustees coming together. It may well be doubted, however, whether, if an election had been accomplished upon the second day, or upon the day of an adjourned meeting, held within a reasonable time, it would have been declared invalid; and possibly, after the adjournment without day, a *mandamus* might lawfully have issued to compel a reassemblage, in order to perform the work which they ought to have done before adjourning. But we need decide nothing in respect to these subjects.

The case of *The Town of Williamsport v. Kent*, 14 Ind. 306, has not been referred to in the briefs, and we deem it unnecessary now to comment upon it.

The judgment is affirmed, with costs.

Howe, J., absent.

Tate, Executrix, v. McLain et al.

No. 9614.

TATE, EXECUTRIX, v. MCLAIN ET AL.

74	493
124	28

WILL.—Construction of.—Devise During Widowhood.—Life-Estate.—Power of Widow as Executrix to Sell Real Estate for Support of Children.—Decedents' Estates.—A testator devised to his widow the residue of his estate after the payment of debts, "to have and hold and use as her own for the benefit of herself and family, so long as she remains my widow," and in case she should marry again, "then it is my will that she should only take what the law provides for widows of men who die intestate, and that the residue be divided among my children, according to law." The will also provided that if the widow remained unmarried until her death, then all the residue of his estate should be sold at public sale, and the proceeds equally divided among his children, taking into consideration advancements made by him, or which his widow might make, to any of the children.

Held, that the property was devised to the widow only so long as she should remain the testator's widow, and that, if she took under the will, she would take but a life-estate in the real estate, in case she should remain unmarried.

Held, also, that such widow, as executrix of the will, could not convert the real estate, or any part thereof, into money, for the support of herself and children, or for the payment of debts contracted by her for such support.

From the Jennings Circuit Court.

W. B. Hagins and *J. N. Hagins*, for appellant.

A. G. Smith, for appellees.

WORDEN, J.—James Tate, deceased, left a will, the substantial parts of which were as follows:

"1st. I will that after my death all my just debts and funeral expenses be paid out of any moneys that may come into the hands of my executor.

"2d. I will and bequeath to my beloved wife, Minerva Tate, all the residue of my estate, both real and personal property of every description, to have and hold and use as her own, for the benefit of herself and family, so long as she remains my widow.

"3d. In case my widow shall marry again, then it is my will that she should only take what the law provides for

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widows of men who die intestate, and that the residue be divided among my children, according to law.

“4th. If my wife remains my widow until her death, then it is my will that all the residue of my estate, including all my real estate, shall be sold at public sale, and the proceeds be equally divided among my children, taking into account all the advancements which have been made to a part of my children heretofore, and any advancements which my wife may make to any of my children, so that all may be made equal in the end and final distribution, if possible.”

This action was brought by the appellant as executrix of the deceased, she being his widow, against his heirs, for the purpose of obtaining a construction of the will.

It appears from the complaint that after paying debts, funeral expenses, etc., only about \$150 remained of the personal property; but there was a quantity of real estate, much of which was unproductive. That the deceased died leaving six children, too small to aid in their own maintenance; and that the plaintiff, being unable to maintain herself and the said children out of the products of the real estate, has, since the death of the testator, contracted debts for the maintenance of herself and the said children, to the amount of \$1,350. That the plaintiff has not as yet made her election whether to take under the will or under the law, and that a construction of the will is necessary in order to enable her to make her election advisedly. Two questions seem to be propounded by the complaint, as follows:

1st. If the plaintiff should elect to take under the will, will she take a fee in the real estate, or only a life-estate?

2d. Can the plaintiff, as executrix, either with or without an order of the court, subject any of the real estate to sale for the payment of the debts contracted by her for the support of herself and the children above mentioned, since the death of the testator?

The court below decided, as we understand the record,

Tindall, Administrator, v. Wasson.

that, if the plaintiff should elect to take under the will, she would take but a life-estate in the real estate of the testator, in case she should remain unmarried.

The court also decided that the plaintiff could not, as such executrix, convert the real estate, or any part of it, into money for the support of herself and the children mentioned, or for the payment of debts contracted by her for such support.

The decision upon both points was plainly right. The property was devised to the plaintiff only so long as she should remain the testator's widow. This could vest in her only an estate during her widowhood, and could not extend beyond the period of her life. *Harmon v. Brown*, 58 Ind. 207; *Stilwell v. Knapper*, 69 Ind. 558, 569.

Upon the other point, it may be observed that the plaintiff may have a just claim against the children mentioned, for the amount expended in their support, but, if so, she can not as such executrix convert their land into money for the payment of the same. A guardian of the children could perhaps procure an order for the sale of their property to pay their debts.

The judgment below is affirmed, with costs.

No. 7398.

TINDALL, ADMINISTRATOR, v. WASSON.

CHATTEL MORTGAGE.—*Description of Property.*—*Pleading.*—*Answer.*—*Demurrer.*—*Evidence.*—*Cases Distinguished.*—In an action by the holder of a chattel mortgage to recover the possession of the property mortgaged, the answer of the vendee of the mortgagor averred that the only description of the property contained in the mortgage is "two mule colts one year old next spring."

74	495
125	436
74	495
133	472
74	495
152	51

Tindall, Administrator, v. Wasson.

Held, on demurrer to the answer, in the absence of any showing which would enable the description to be made certain by parol evidence, that such description is insufficient. *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Burns v. Harris*, 66 Ind. 536, distinguished.

SAME.—*Description of Property intended to be Mortgaged.—Identification.*—A description in a chattel mortgage which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient.

SAME.—*Evidence.*—Parol evidence is admissible to identify the particular property described in a chattel mortgage; that is, parol evidence may aid, not make, a description in such mortgage.

PLEADING.—*Practice.—Exhibit.*—An exhibit which does not constitute the foundation of a pleading, though filed therewith, will not be considered by the Supreme Court, either for the purpose of sustaining or overthrowing such pleading.

From the Shelby Circuit Court.

J. B. McFadden, J. W. Tomlinson and E. S. Stilwell, for appellant.

B. F. Love and H. C. Morrison, for appellee.

ELLIOTT, J.—The appellant instituted this action to recover certain personal property described in the complaint as “two brown female mules.” The appellee answered in four paragraphs, and the question which this appeal presents is, whether the second paragraph of the answer stated facts sufficient to constitute a defence.

The paragraph of the answer referred to contains, in substance, these allegations: That the only claim or right of the plaintiff to the property in controversy is founded upon a chattel mortgage, executed by one Gore on the 7th day of January, 1871; that the property was described in said chattel mortgage as follows: “Two mule colts one year old next spring;” that this was the only description of the mules in said mortgage; that the mortgagor, after the execution of the mortgage, sold the mules to Elijah Goodwin; that Elijah Goodwin sold to Nelson Goodwin; that the appellee afterward bought the mules of Nelson Goodwin for a valuable consideration; that he had no knowledge of the exist-

Tindall, Administrator, v. Wasson.

ence of appellant's mortgage. We have given only a mere outline of the answer, but one sufficient to present the question discussed by counsel, and upon which the case turns. The sole question discussed is as to the sufficiency of the description of the property, which the answer alleges is contained in the mortgage.

Appellant cites in support of his position, that the mortgage sufficiently describes the property, three cases, which we will briefly consider. In *Duke v. Strickland*, 43 Ind. 494, the description in the mortgage was, as we gather from the opinion in that case, "a ten-acre field of growing wheat on the northwest quarter of the southwest quarter, of section thirty-four, township eighteen, range ten. in Henry county, Indiana." It will be observed that in the case cited the locality of the property was particularly pointed out, and the means of identifying it clearly supplied. It is true that the inference deducible from the fact that the case referred to expressly overrules the earlier case of *McCord v. Cooper*, 30 Ind. 9, goes very far toward supporting the theory of the appellant. In the overruled case, the description of the property was "three yoke of oxen," and there was no locality or other circumstances of identity mentioned. It seems to us that there was no real conflict between the two cases, for in the former there were circumstances of identification which were altogether wanting in the latter. In *Ebberle v. Mayer*, 51 Ind. 235, the description in the mortgage was as follows: "All the stock, tools, fixtures and materials now on hand in the shop formerly occupied by said Kreber & Co., on Central avenue, in the city of Madison, Ind., and being the same property this day sold to us by said Kreber & Co." This was held a sufficient description, upon the authority of *Duke v. Strickland*, without any discussion or citation of cases. It will be noticed that, as in the case upon which it is based, there is in the mortgage passed upon by the case

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referred to, a statement of locality and other matters of identification. In this respect the cases of *Duke v. Strickland* and *Ebberle v. Mayer* are essentially different from the case in hand. In *Smith v. McLean*, 24 Iowa, 322, the description in the mortgage was "five freight wagons, and twenty-five yoke of cattle being the train now in my possession," and it was held sufficient. It was there said: "That description which will enable third persons, *aided by inquiries* which the instrument itself indicates and directs, to identify the property, is sufficient." The doctrine declared in the extract quoted is well sustained by authority. The general rule is plain enough, but the difficulty is to determine, in each particular case, what description is sufficient to indicate and direct inquiries which will result in the identification of the property. In the case under consideration, there are no circumstances of identification named except such as may be found, if any can be found, in the words "two mule colts one year old next spring." This description certainly does not indicate any particular mule colts, for it would apply to any mule colts in the world which would be one year old the spring following the execution of the mortgage. If one had undertaken to find the particular mules mortgaged, by means of "inquiries indicated and directed" by the description in the mortgage, his field of inquiry would have been a very wide one, for with the exception of the statement of the age there is not a single circumstance of identification stated.

We are not attempting to lay down any general rule in the present case, but confine ourselves to the decision of the precise question presented. The answer avers, and the demurrer admits, the truth of the allegation, that "the only description contained in the mortgage is, 'two mule colts one year old next spring.' " There are no circumstances of identity stated, neither locality, ownership, nor anything else affording means of identification. The description we have given stands alone and unaided. We hold such a description

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as that contained in the mortgage and stated in the answer, to be insufficient. If it were aided by any circumstance or matter of identification which would enable the description to be made certain by parol evidence, it would be otherwise.

A copy of the mortgage is filed with the answer, but, as it does not constitute the foundation of the paragraph, we can not examine it, either for the purpose of sustaining or overthrowing the pleading.

Judgment affirmed.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—A petition for a rehearing has been filed, calling our attention to the case of *Burns v. Harris*, 66 Ind. 536, and insisting that our ruling in this case is in conflict with the case cited. We carefully examined the cases cited in appellant's original brief, and supposed they were the only ones upon which he relied as being applicable to the points made by him, and as he did not call our attention to the case now cited, it received no examination from us. This case, and the only case cited in the brief of counsel on this petition, is the one to which we have referred. The question in that case arose upon the evidence, and not, as here, upon the pleading. In the original opinion in this case, we said: "We are not attempting to lay down any general rule in the present case, but confine ourselves to the decision of the precise question presented. The answer avers, and the demurrer admits, the truth of the allegation, that 'the only description contained in the mortgage is, 'two mule colts one year old next spring.'" It is true, by the appellant's concession, that there was no other description given or information furnished than such as the words, "two mule colts one year old next spring," gave and supplied. There were no circumstances of identification, nothing to enable a third person to identify the property intended to be mortgaged. The answer excluded the in-

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ference that there were any such circumstances. A careful examination of the authorities has satisfied us that the conclusion reached in the original opinion is correct. In *Golden v. Cockril*, 1 Kan. 259, the description was "one hundred and twenty-four head of mules now in the territory of Kansas," and "one pair of claybank horses," and it was held insufficient. In another case the description was "ten new buggies," and it was held to be not sufficient as against purchasers in good faith. *Blakely v. Patrick*, 67 N. C. 40. In *Ellis v. Martin*, 60 Ala. 394, the description was, "my entire crop of corn and cotton of the present year," and it was held not good. The property in controversy in *Montgomery v. Wight*, 8 Mich. 143, was described as "one sorrel horse," and this was declared to be an insufficient description. But we think it unnecessary to further comment upon the cases. There are very many sustaining the rule declared in the cases already cited; among them, *Kelly v. Reid*, 57 Miss. 89; *Bowers v. Andrews*, 52 Miss. 596; *Rose v. Scott*, 17 U. C. Q. B. 385; *Parsons Savings Bank v. Sargent*, 20 Kan. 576; *Winter v. Landphere*, 42 Iowa, 471; *Richardson v. The Alpena Lumber Co.*, 40 Mich. 203; *Newell v. Warner*, 44 Barb. 258; *Fowler v. Hunt*, 48 Wis. 345; *Rowley v. Bartholomew*, 37 Iowa, 374. A late writer, in speaking of the description, says: "But the mortgage to be effectual must point out the subject-matter of it, so that a third person by its aid, together with the aid of such inquiries as the instrument itself suggests, may identify the property covered." *Jones Chattel Mortgages*, sec. 55. In the case now in hand the mortgage, according to the admitted allegations of the answer, suggests no inquiry whatever beyond that suggested, if any can be said to be suggested, by the vague and indefinite clause, "two mule colts one year old next spring." Nothing at all is added to these words; not a single circumstance which will suggest or aid inquiry. The answer in effect negatives the existence of any extrinsic circumstances of identity.

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If the appellant had replied to appellee's answer showing any circumstances of identification, a very different question would have been presented; but instead of that counsel assumed the unnecessary hazard of conceding the truth of the strong allegations of the answer, and can not now treat the question, as counsel endeavor to do, as one of evidence. It is not doubted that parol evidence is admissible to aid in identifying the mortgaged property. There is no hint of a contrary doctrine in the opinion already delivered, nor was there any thought of declaring any such thing.

In the case of *Burns v. Harris, supra*, the question as to the sufficiency of the mortgage came up on the evidence, and was presented very differently from the question arising here. In that case the mortgage was given in evidence, without objection, and parol evidence was introduced to identify the property; and it was there said by Howk, J., that "in such a mortgage the property ought to be described with reasonable accuracy, certainty, and particularity, so that the property intended to be mortgaged may be readily ascertained and identified. Indeed, the main object of the description is the identification of the property; for where the description is doubtful or uncertain the property may be identified beyond all doubt by the ownership and possession thereof by the mortgagor. It must be regarded as settled law in this State that parol evidence is admissible to identify the particular property in a chattel mortgage." This we deem a correct statement of the law, but it does not mean, as appellant seems to think, that any description, no matter how slight, will be sufficient. The language quoted conveys no such meaning. It means that parol evidence may aid, not make, a description. In cases where the instrument suggests and indicates proper inquiry, parol evidence is always admissible to aid, but not to supply, a description. Properly understood, the language we have quoted is in entire harmony with the rule declared by the eminent author we

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have quoted from. Says this author, in speaking of the admissibility of parol evidence: "It can not be used to supply what the parties have omitted, or to reject a reference in the description which is true." Jones Chattel Mortgages, sec. 64. The infirmity in the description exhibited by the answer is that it does not supply any circumstances of situation, of place, or indeed circumstances of any character, to afford information or suggest inquiry. Returning to the case of *Burns v. Harris*, we find that the judge who delivered the opinion of the court said: "In the case at bar there is no room for doubt, on the evidence, as to the identity of the mare mortgaged to the appellee, with the mare in the possession of the appellants, and in controversy in this action. The question in dispute was as to the color of the mare,—whether she was a 'dark bay mare,' or a 'dark brown mare.'" It was also said: "A chattel mortgage, wherein the mortgaged chattel is described as a 'dark bay mare,' is not void for uncertainty in the description of the chattel." As applied to the question presented upon the evidence, with all the circumstances of ownership and location before the court, the statement was entirely correct. But the case in which that language was used, and the facts to which it was intended to apply, are widely different from the case we have in hand. Here there is, as is expressly conceded, not a solitary circumstance to aid the description, which in itself is about as vague and indefinite as a description could very well be. If there had been, as doubtless there might have been, had counsel pursued the usual course, evidence offered in aid of the description, it might have been made sufficient. Without some such aid, the description is so indefinite as to supply no grounds of identifying the mortgaged property, for taken alone it would apply to any "mule colts one year old" in the spring of 1871.

Counsel treat the case as if it were one between a mortgagor and mortgagee, when it is in fact one between the mortgagee

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and a *bona fide* purchaser without actual notice. In such a case there must be such a description as will impart sufficient information to the purchaser to enable him, by inquiries suggested by the instrument itself, to identify the property. The peculiar frame of this answer excludes any inference that there was any such information imparted by the record.

If appellant had replied, showing circumstances of identification, a very different question would have been presented, but instead of doing this he confessed by his demurrer that such circumstances did not exist. The effect of his demurrer was to concede that the only means by which the property could be identified were furnished by the description in the mortgage, and it is plain that nothing therein contained served to distinguish the mule colts named, not described, from any others of like age, owned by the mortgagor or anybody else.

Petition overruled.

74	508
128	156
74	503
149	369

No. 8291.

STANTON ET AL. v. THE STATE, EX REL. RICH ET AL.

PRACTICE.—*Supreme Court.*—*Overruling Motion to Strike Out.*—A judgment will not be reversed on account of overruling a motion to strike out parts of a pleading.

SAME.—*Sustaining Motion to Strike Out.*—An error in sustaining a motion to strike out can not be cured in the introduction of the testimony, and, when properly in the record, ought to be considered.

SAME.—*Bill of Exceptions.*—Matter struck out of a pleading on motion can be put into the record again only by being copied into a bill of exceptions.

SAME.—*Partition.*—*Action on Bond of Commissioner Appointed to Sell.*—*Rents and Profits.*—*Evidence.*—On the trial of an action by heirs upon

Stanton *et al.* v. The State, *ex rel.* Rich *et al.*

the bond of a commissioner appointed to sell real estate in a proceeding for partition, plaintiffs can not, while suing for the purchase-money and interest, claim, and give evidence of, the rents and profits which have accrued after the sale.

BRIEF.—*Waiver.*—An error assigned, but not discussed or referred to by appellant's counsel, is waived.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellants.

A. F. Shirts, *G. Shirts* and *W. R. Fertig*, for appellees.

FRANKLIN, C.—This was a suit by the heirs of John Green against Isaac W. Stanton, as principal, and Sylvanus Carey as surety, upon a bond as commissioner to sell real estate, under a partition proceeding. The complaint alleges that Stanton as such commissioner sold the land for \$1,700; that the order required the commissioner to sell the land for one-third cash in hand, and the balance payable in two equal instalments in twelve and eighteen months respectively, taking notes with good freehold surety for deferred payments; that said commissioner, on the 5th day of February, 1874, reported to the court that he had sold the land, in all things in pursuance of the order for sale, which report was confirmed by the court, and the purchaser was put in possession of the premises; that the report was false; that said Stanton had only received from the purchase \$250, instead of the one-third of the said \$1,700; that he took no security on the purchaser's notes for the balance of the purchase-money; that the purchaser was worthless and insolvent; that said commissioner never collected but \$500 of said purchase-money, and that he converted to his own use; that the notes for the balance are entirely worthless; that the purchaser ever since has remained in the possession of the premises, and that the rental value thereof was reasonably worth \$200 per annum; that said commissioner had delayed settlement for over five years, and had unnecessarily made large costs and expenses, in the sum of \$500; that the lands

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were worth \$2,000 at the time of the sale, but have depreciated since that time until they are not now worth over \$1,000.

The defendants filed a written motion to strike out parts of complaint, which motion was overruled by the court and excepted to by defendants. Defendants then filed a demurrer to the complaint, alleging for cause the insufficiency of facts; which was overruled by the court, and excepted to by defendants. Defendants then filed an answer in three paragraphs. Plaintiffs moved to strike out parts of second paragraph of answer, which was sustained by the court, and defendants excepted. Plaintiffs replied by a general denial. Trial by court; finding and judgment for plaintiffs for two thousand and forty dollars (\$2,040).

Defendants filed a motion for a new trial, and assigned therefor the following reasons:

“1st. Because the finding of the court is contrary to law.

“2d. Because the finding of the court is contrary to the evidence.

“3d. Because the finding of the court is not sustained by sufficient evidence.

“4th. For error of law committed by the court in allowing the plaintiff to introduce in evidence, over the objections of the defendants, the complete record in the case of *Rachel Newby v. Seth Green*, partition suit, No. 452.

“5th. For error of law committed by the court in allowing the plaintiff to introduce in evidence, over the objections of the defendants, on the trial of said cause, the judgment taken in said court, and execution and return thereon, in the case of *Stanton, as Comm'r, v. Carey*, for the purpose of showing the insolvency of Levi G. Carey.

“6th. For error of law committed by the court, at the trial of said cause, in allowing the plaintiff to introduce in evidence, over the objection of the defendants, the notes executed by said Carey to said Stanton.

“7th. For error of law committed by the court, at the

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trial of said cause, in allowing the witness R. B. Jones, in behalf of the plaintiff, over the objection of the defendants, to testify as to the rents and profits of said land, and rental value of the land, for the last five years.

“8th. For error of law committed by the court at the trial of said cause, in allowing the witness R. C. Mendenhall, in behalf of the plaintiff, over the objection of the defendants, to testify as to the rents and profits of the land from the 31st day of January, 1874, until the present time.

“9th. The damages assessed by the court are excessive.”

Motion overruled by the court, and excepted to by defendants. Bill of exceptions filed, embracing motions to strike out, and sixty days given to file bill of exceptions. Further bill of exceptions, embracing the evidence, filed in time.

Appellants have filed in this court the following assignment of errors, to wit:

“1st. The court erred in overruling appellants’ motion to strike out parts of complaint;

“2d. The court erred in overruling appellants’ demurrer to the complaint;

“3d. The court erred in sustaining appellee’s motion to strike out parts of appellants’ second paragraph in their answer;

“4th. The court erred in overruling appellants’ motion for a new trial.”

This court has so repeatedly decided that a judgment will not be reversed on account of overruling a motion to strike out parts of a pleading, for the reason that advantage can be taken of any such objection, upon the introduction of the testimony, that it is unnecessary to cite authorities in support thereof.

An error in sustaining a motion to strike out can not be cured in the introduction of the testimony, and when properly in the record, ought to be considered. The portions stricken out can only be put into the record again by being

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copied in a bill of exceptions. That has not been done in this case.

In the bill of exceptions reference is made to the parts stricken out, by naming lines and pages in the original paragraph of the answer. But as those parts have been stricken out, this does not place them back in the record, and they can not be considered by this court. *The City of Crawfordsville v. Barr*, 45 Ind. 258. We see no available error in the rulings of the court upon the motions to strike out.

The second error assigned has not been discussed or referred to by appellants' counsel in their brief. It is therefore waived.

The fourth error assigned is the overruling of the motion for a new trial.

Counsel for appellants have discussed and referred us to the seventh, eighth and ninth reasons for a new trial. They embrace the objections to the introduction of the testimony of Jones and Mendenhall upon the value of the rents and profits of the land for the last five years, and the excessive damages found by the court. This testimony was erroneously admitted. Plaintiffs had no right to claim the rents and profits of the land, which had accrued after the sale, while treating the sale as valid, and suing for the purchase-money with the interest thereon. Counsel for appellees insist that this is a harmless error, if it may be considered an error, and in support thereof have referred us to the case of *Adams v. Dale*, 38 Ind. 105. In that case the court announced in its finding that the illegally admitted testimony had been entirely excluded from consideration. The record in this case does not show anything of that kind. Nor does it show what facts the court took into consideration in the assessment of the damages. And if it did not take into consideration the rents and profits, we are not prepared to say the damages were not excessive. The evidence shows that the commissioner had paid out to the proper parties

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some \$1,700.00, including reasonable fees for his services, and this does not include any of the costs of litigation or in the partition proceedings, which plaintiffs charged in the complaint to be five hundred dollars; nor does it include any attorney's fees. Should he receive a credit for all these, and have the same deducted from the \$3,200.00, a balance of \$2,040.00 would seem to be rather excessive. However, this can be properly adjusted in another trial of the cause.

We think the court committed such an error, in the admission of said testimony, as to require a reversal of the judgment.

PER CURIAM.—It is therefore ordered upon the foregoing opinion, that the judgment below be, and it is hereby, in all things reversed, at costs of appellees, and the cause is remanded, with instructions to sustain the appellants' motion for a new trial, and for further proceedings.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellees, in their petition for a rehearing, insist that the error of introducing evidence, on the trial, of the value of the rents and profits of the land, if an error, is harmless, for the reason that the amount of the damages assessed was about correct, and the judgment ought to be affirmed.

But, if the damages are still considered by this court as excessive, we are asked to determine the amount of the excess, so that appellees can enter a remittitur, and have the judgment affirmed.

It can not be seriously questioned that a party suing for the purchase-money of the land can not in the same action recover for the rents and profits of the land which had accumulated after the sale; and, if he could not recover them, he would have no right to introduce evidence of them; and, the record not affirmatively showing that this evidence was

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not considered in the assessment of damages, its introduction was clearly erroneous.

Appellees, in their petition for a rehearing, admit that appellant's credits for payments made to heirs and for services as commissioner, amounted to about \$1,700. If this included all the credits that appellant was entitled to, the assessment of damages would be very nearly right. But this amount does not include the costs in the original partition proceedings, nor the costs upon the intermediate litigation to collect the purchase-money for the land sold, nor does it include attorney's fees. If the heirs are permitted to recover the whole amount of the balance of the proceeds of the sale of the land, there will be no fund left with which to pay these costs and attorney's fees. Thus the damages still appear to be excessive. We would willingly determine the amount of the excess and allow a remittitur, if we had the data upon which to do so. The evidence does not show the amount of the costs or attorney's fees, and, as the charge in the complaint is in the gross sum of \$500, we fear it would be doing appellees injustice to find that amount. It may be the appellants' fault that the proof does not show these facts; and it may also be said to be the fault of appellees, that the improper testimony of the value of the rents was introduced.

We think the best thing that we can do in the case is to reverse it, in order that the expenses of administering the trust may be properly adjusted in a new trial. We therefore adhere to our original opinion.

PER CURIAM.—It is therefore ordered that the petition for a rehearing be overruled.

 Jones v. Rhoads.

No. 9299.

JONES v. RHOADS.

74	510
124	356
74	510
152	261

WILL.—Devisee.—Compromise.—Admission of Validity.—Estoppel.—The mere fact that a devisee has paid all the devised lands are worth, to obtain from the heirs an admission by decree, in an action to set the will aside, that the will is a valid instrument, and binding upon the parties to the compromise agreement, does not impair the force or effect of the admission after it has been made; and, while such adjudication stands, such heirs are precluded from reasserting the invalidity of the will collaterally.

JUDGMENT.—Payment by Replevin Bail.—Execution.—When a judgment has been paid by the replevin bail, it remains in force for his benefit, and may be proceeded upon to execution for his use.

SAME.—Order of Court.—Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely to arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied, for his own use; but there is no statutory provision requiring such an order to be first obtained.

SAME.—Equitable Interest.—Priority.—A previously acquired equitable interest in a tract of land has priority over the general lien resulting from a judgment against the holder of the legal title.

SAME.—Replevin Bail.—Rights not Abridged.—Where a replevin bail is not a party to a proceeding in which the lien of the judgment is declared to be junior to the lien of a mortgage sued on, his remedial rights are in no manner abridged by the foreclosure proceedings.

SAME.—Priority of Lien.—Devisee.—Mortgage to Heirs.—The lien of a judgment against a devisee of lands, so far as it enures to the benefit of his replevin bail, has priority over the lien of a mortgage on the devised lands, given by the devisee to the heirs of the testator in compromise of an action to set the will aside.

MORTGAGEABLE INTEREST.—Devisee.—Where the alleged will of a testator is in fact an invalid instrument, the entire estate in his lands, legal and equitable, descends to his heirs, and the devisee has no mortgageable interest in the lands which the will purports to devise to him.

From the Montgomery Circuit Court.

T. H. Ristine, P. S. Kennedy and W. T. Brush, for appellant.

G. D. Hurley and B. Crane, for appellee.

NIBLACK, J.—Suit by Jonas A. Jones against Jacob Rhoads. The complaint alleged that, in 1875, one Isaac Castor died in Montgomery county, leaving a large number

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of children and grandchildren, and seized of certain tracts of land in that county ; that the said Isaac Castor left also a pretended last will and testament, by which said tracts of land were devised to one Daniel Rhoads ; that, soon after the death of said Isaac Castor, Nancy J. Jones and others of his children and grandchildren instituted a suit in the Montgomery Circuit Court, to set aside said pretended will, upon the alleged grounds that the execution of the same had been procured by undue influence of the said Daniel Rhoads, and that the said Isaac Castor was not of sound mind at the time he executed the same ; that, while said suit was pending in said court, the parties thereto entered into a written contract of compromise, by which the heirs at law of the said Isaac Castor, who had instituted such suit, and who were all of his heirs surviving him, except the wife of the said Daniel Rhoads, were to make quitclaim deeds, releasing all their interests in said lands to the said Daniel Rhoads, upon his executing his notes to them for the sum of five thousand dollars, for their said interests so to be released, the said sum being the full value of such lands, aside from the interest therein of the wife of said Rhoads, which notes were to be secured by a mortgage on said lands ; that it was a part of said agreement of compromise that when said notes and mortgage should be duly executed, the court should enter a decree establishing the validity of said last will and testament ; that all the terms and conditions of said agreement of compromise were carried into effect by the execution of said notes and mortgage by the said Daniel Rhoads, his wife joining in the mortgage, and the entry of a decree duly establishing said last will and testament ; that the notes and mortgage were all executed to the plaintiff, as trustee for all the plaintiffs in the suit to set aside the will ; that, when said notes matured, the plaintiff foreclosed said mortgage and caused the mortgaged lands to be sold at sheriff's sale, to satisfy the judgment of foreclosure ; that he pur-

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chased said lands at such sheriff's sale, and that he then held a sheriff's deed for the same; that, at the time said notes and mortgage were executed, there were two judgments against the said Daniel Rhoads, in the said Montgomery Circuit Court, one in favor of John M. Patton for \$650.00, and the other in favor of the First National Bank of Crawfordsville for \$177.00, both of which judgments were unpaid and had been stayed by Jacob Rhoads, the defendant; that, after the plaintiff had foreclosed said mortgage, and after he had so purchased the mortgaged lands at sheriff's sale, the said Jacob Rhoads, as the replevin bail thereon, paid and satisfied the said judgment in favor of the said John M. Patton, and thereupon, without any order of court and without any proceedings whatever in court, caused the clerk of the Montgomery Circuit Court to issue an execution on said judgment and caused the same to be levied on said mortgaged lands, and said lands to be sold on said execution; that the said Jacob Rhoads purchased said lands at the sale upon such execution, and now holds the sheriff's certificate of purchase, which will entitle him to a sheriff's deed to such lands at the expiration of one year from the date of said sale, which year will elapse on the 11th day of September, 1881; that the said Jacob Rhoads is claiming, that when he shall obtain a sheriff's deed, in pursuance of his said certificate of purchase, he will have a good title to the said mortgaged lands as against this plaintiff; that, at the time the plaintiff filed his complaint to foreclose the mortgage executed by the said Daniel Rhoads and wife, he made the said John M. Patton a party defendant to answer the allegation that his said judgment was junior to said mortgage; that said Patton made default in said action, whereupon the court decreed his judgment to be junior to the mortgage. Wherefore the plaintiff demanded that the court should order and decree that the said Jacob Rhoads has no interest whatever in and to said mortgaged lands by

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virtue of his said purchase at sheriff's sale ; that said sale to him was and is void ; that the cloud on the title of the plaintiff to said lands caused by the said sale to the said Jacob Rhoads be removed ; and that it shall be further ordered and decreed that, if the said Jacob Rhoads has any interest in said lands, it is only the right to redeem the same from their said sale to the plaintiff. General relief was also demanded.

The defendant demurred to the complaint for want of sufficient facts, and his demurrer was sustained. The plaintiff refusing to plead further, final judgment upon demurrer was rendered against him. In this condition of the record, we have only to inquire whether or not the complaint was sufficient.

The appellant argues that the agreement of compromise between Nancy J. Jones and others, of the one part, and Daniel Rhoads, of the other, referred to in the complaint, impliedly admitted that the pretended will of Isaac Castor was invalid, because, by that agreement, the said Rhoads agreed to pay the full value of the lands in controversy, from which it must be inferred, that he did not rely upon his title under the will, and that, as a result of the invalidity of that instrument, Daniel Rhoads took only the naked legal title to the lands which he claimed under it, the equitable interest in such lands descending to the heirs at law of the said Isaac Castor ; that, in that condition of the title, the equitable interest of such heirs constituted a lien upon the lands superior to the lien created by Patton's judgment, by reason of which the judgment lien was postponed in favor of, and became subordinate to, the lien created by the mortgage.

It is a well settled rule of law, that a previously acquired equitable interest in a particular tract of land has priority over the general lien resulting from a judgment against the holder of the legal title. *The Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562 ; *Armstrong v. Fearnaw*, 67 Ind. 429 ; *Wharton v. Wilson*, 60 Ind. 591 ; *Glidewell v. Spaugh*, 26

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Ind. 319. But that doctrine evidently has no application to the case now before us.

If the alleged will of Isaac Castor was in fact an invalid instrument, then the entire estate in his lands, both legal and equitable, descended to his heirs at law, and not to his devisee, and the will was, at most, but a cloud on their title. In that view of the case, Daniel Rhoads had no mortgageable interest in the lands which the will purported to devise to him.

We do not, however, construe the agreement of compromise as in any manner admitting the invalidity of the will. On the contrary, we feel constrained to give that agreement a very different construction. The stipulation that the court should enter a decree establishing the will plainly operated as an admission, that the will was a valid instrument, and binding upon the parties to the compromise. The mere fact that Daniel Rhoads may have paid all the lands were worth to obtain such an admission did not impair the force or effect of the admission after it was made.

By the consent of the parties contesting it, the will was adjudged to have been duly established, and with that adjudication remaining in force, those parties are now precluded from reasserting the invalidity of the will in the collateral way attempted in this case. Jacob Rhoads, not being a party to the proceedings for the foreclosure of the mortgage, was not bound by so much of the decree of foreclosure as declared the lien of the Patton judgment junior to the lien created by the mortgage, and his remedial rights as a party to the Patton judgment were in no manner abridged by the foreclosure proceedings.

The appellant further argues that the sheriff's sale to Jacob Rhoads ought to be set aside, because the execution upon which it was made was issued improvidently; that is to say, without an order of court, authorizing it, being first obtained. Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely to

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arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied, for his own use; but we know of no statutory provision which can be construed to require that such an order shall be first obtained. When a judgment has been paid by the replevin bail it remains in force for his benefit and may be prosecuted, that is, proceeded upon, to execution for his use. 2 R. S. 1876, p. 279, sec. 676. In such a case the statute continues the judgment in force so as to enable the replevin bail to have execution upon it as in other cases.

Our inference from the facts averred is that the lien of the Patton judgment, so far as it inured to the benefit of Jacob Rhoads, had priority over the appellant's lien acquired by the mortgage, and that the complaint did not make out a case entitling the appellant to any relief against the appellee.

The judgment is affirmed, with costs.

 No. 8202.

SMITH v. BRYAN.

REAL ESTATE.—*Sale for Unpaid Taxes.*—*Action to Recover and Quiet Title.*—

Statute of Limitation.—An action brought in 1879 to recover possession of real estate sold for taxes in 1866, and to quiet the title, was too late under section 250 of the act of December 21st. 1872, 1 R. S. 1876, p. 127.

SAME.—*Where Time Allowed had Expired.*—A reasonable time must be allowed for instituting suit as to causes of action existing at the passage of such a law; and where the whole time allowed by the statute had expired before its passage, the statute did not apply until the time allowed by it had run.

SAME.—*Legal Disabilities.*—*Non-Residence.*—*State.*—*United States.*—The phrase "other legal disabilities," in the proviso of section 250, *supra*, does not embrace non-residence in the State, but, so far as it refers to absence, means "out of the United States." 2 R. S. 1876, p. 313, sec. 797.

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136	178
74	515
158	626

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SAME.—Valid or Void Sale for Taxes.—Statute of Limitations Good Plea in Bar.—Whether a tax sale was valid or void, a plea of the statute of limitations is a good defence to an action to quiet title, and, if sustained by the evidence, bars a recovery of possession, and the title of the party so barred can not be quieted.

SAME.—Evidence.—Title.—Possession of Grantor.—In an action to recover real estate, the plaintiff recovers on the strength of his own title, and not on the weakness of the defendant's title, and he must trace his title to the United States, or to a grantor in possession.

From the Tippecanoe Circuit Court.

D. Walton, for appellant.

J. M. Larue and *F. B. Everett*, for appellee.

BICKNELL, C.—This was an action to quiet the title to land, and to recover possession, with damages for detention. The complaint is in three paragraphs.

The first alleges the appellant's ownership, and that the appellee claims title adverse to appellant.

The second paragraph alleges the appellant's ownership, and a conveyance by him to James M. Bolton, during the adverse possession of the appellee, who claims title, etc.

The third paragraph states the appellant's ownership, and his conveyance to James M. Bolton, and that, at the date of said conveyance, the land was in the adverse possession of Robert Lewis, who conveyed the same to the appellee, who claims title, etc.

The complaint prays that the title may be quieted, and that the appellant may recover possession, with five hundred dollars damages, and all other proper relief.

Robert Lewis was afterward made a co-defendant on his own petition. There were pleadings as to him, and the appellee filed a cross complaint against him; and the court found that, as between him and the appellee, the appellee was the owner of the land; but Lewis did not join in the appeal, and is not a party to it, and he need not be further considered.

The appellee answered the complaint in two paragraphs:

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First, the general denial ; second, the statute of limitations, to wit, that the lands had been sold for taxes, and that the appellant's cause of action did not accrue within five years before the commencement of the suit.

The appellant demurred to this second paragraph of answer. The court overruled the demurrer, and this overruling is one of the errors assigned by appellant.

The statute provides that actions to recover real property sold for taxes must be brought within five years after the date of the sale for taxes. 1 R. S. 1876, p. 127, sec. 250. This act was approved December 21st, 1872, and took effect upon its passage. Acts 1872, pp. 57, 129. As to causes of action existing at the passage of such a law, a reasonable time must be allowed for instituting suit. *Pritchard v. Spencer*, 2 Ind. 486. And in cases where the whole time allowed by the statute had expired before its passage, the statute does not apply until the time allowed by the statute has run. *The State v. Clark*, 7 Ind. 468 ; *Dale v. Frisbie*, 59 Ind. 530.

In the present case, the last of the tax sales was on the 5th of February, 1866 ; the statute prescribing the limitation was approved December 21st, 1872 ; the suit was brought in 1879, more than six years after the passage of the law ; a reasonable time had elapsed. The second paragraph of the appellee's answer was sufficient ; the court committed no error in overruling the demurrer to it.

The appellant replied to the second paragraph of the appellee's answer, in two paragraphs. The first was in denial. The second averred that at the time of said sales for taxes, and for months before and ever since, the appellant was a non-resident of Indiana and a resident of the State of New York. The appellee demurred to this second paragraph of reply, and the court sustained the demurrer. The sustaining of this demurrer is the second error assigned by appellant.

The statute of December 21st, 1872, above referred to,

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contains the following provision: "That where the owner of such real property, sold as aforesaid, shall, at the time of such sale, be a minor, insane, or under other legal disabilities, five years after such disability is removed, shall be allowed such person or persons, their heirs or legal representatives, to bring their suit or action," etc.

The phrase, "other legal disabilities," does not embrace non-residence in the State. It is defined in the Revised Statutes of 1852, and it means "out of the United States," so far as it has reference to absence. 2 R. S. 1876, p. 313; *Bauman v. Grubbs*, 26 Ind. 419. The second paragraph of the reply, therefore, did not avoid the second paragraph of the answer, and the court committed no error in sustaining the demurrer.

The issues were tried by the court, who found for the appellee. The appellant moved for a new trial, because—

First. The finding was not sustained by sufficient evidence;

Second. The finding was contrary to law.

The court overruled the motion for a new trial, and rendered judgment upon the finding. The appellant assigns three errors, two of which have already been considered. The third is, that the court erred in overruling the motion for a new trial.

Where the statute of limitations bars recovery of possession, the title of the party so barred can not be quieted; it would be idle to quiet a title that could never be carried into possession. *Dumont v. Dufore*, 27 Ind. 263. In these actions the plaintiff recovers on the strength of his own title. The weakness of the defendant's title does not help the plaintiff. *Huddleston v. Ingels*, 47 Ind. 498. The appellant's evidence in this case does not trace his title to the United States, nor to any grantor in possession; therefore he could not recover. *Huddleston v. Ingels, supra*. But further, the appellant's evidence took the title out of him, if he ever had it. He introduced a deed from him-

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self to James Bolton. This deed, made by appellant while out of possession, was invalid against the party in adverse possession, and against all claiming under him; but it was good between the parties. It authorized the grantee to bring ejectment against a mere stranger, in his own name, and it authorized the grantee to use the grantor's name in an action against the party in possession. *Steeple v. Downing*, 60 Ind. 478.

Under the foregoing authorities, the finding of the court in favor of the appellee, as against the appellant, was right, and the judgment of the court below in favor of the appellee, and against the appellant, ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below in favor of the said appellee and against said appellant be, and the same is hereby, in all things affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

BICKNELL, C.—The petition alleges that “this court erred in sustaining the plea of the statute of limitations.” The plea was good. 1 R. S. 1876, p. 127, sec. 250. There was evidence tending to sustain it, and showing that the lands intended to be sold, and actually sold for taxes and taken into possession by purchaser, and held by him and those claiming under him, for several years continuously next preceding the commencement of the suit, were the lands described in the complaint. Upon such evidence, it makes no difference, so far as the statute of limitations is concerned, whether the tax sale was valid or void. In either case, it was barred by the statute. But in this case the plea of the statute was superfluous, because the plaintiff's own evidence was insufficient to warrant a recovery. The petition for a rehearing ought to be overruled.

PER CURIAM.—Petition overruled.

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No. 7044.

THE CITY OF DELPHI v. LOWERY, ADMINISTRATRIX.

NEGLIGENCE.—Cities and Towns.—Evidence.—Destitution of Family.—In an action against a city, by the representative of a person whose death is alleged to have been caused by the negligence of the defendant, evidence that the deceased left his family in a destitute condition is incompetent.

SAME.—Streets.—Duty of Municipal Corporation.—Where there is a dangerous place in or near the usually travelled part of a street of a city, the municipal authorities must use ordinary care to protect persons who make lawful use of such street, in a reasonably prudent manner, from injury; and such duty is not fully discharged by making the travelled part of the street safe, but such measures as ordinary prudence requires must be taken to prevent persons, using ordinary care, from falling into dangerous places along the sides, or in close proximity to the termination, of the streets of the municipality.

SAME.—Evidence of Prior Injuries to other Persons.—Notice.—Corporation.—For the purpose of showing that a municipal corporation had notice of a dangerous place within or near the limits of one of its streets, evidence that other persons had previously been injured there is competent.

SAME.—City.—Common Council, Record of.—Evidence.—A city corporation is represented by the common council, and the acts of that body, done in regular session, and within the scope of the powers conferred by law, are binding upon the corporation; and the record of such council, showing the report of a committee appointed by them, and the action taken thereon, is admissible in evidence against the municipal corporation.

SAME.—Instructions.—Measure of Damages.—Where facts are allowed to go in evidence, which furnish an incorrect basis for the assessment of damages, an instruction which directs the jury to determine from "all the facts" the amount of recovery is erroneous. The jury are not to determine the amount of recovery from all the facts, but only from such facts as form proper elements for consideration in computing damages; and where facts are given in evidence which ought not to be considered in estimating damages, the instructions of the court should inform the jury what facts should be considered by them in making their estimate, and not leave it to them to take into account facts which have no legitimate bearing upon that branch of the case.

SAME.—Discretion of Jury.—Damages.—A jury has a very broad discretion upon the subject of damages, but it is to be exercised upon proper facts; and improper elements influencing, not the judgment, but the passions or prejudices, should not form any part of the elements out of which the judgment of the jurors is to be constructed.

PRACTICE.—Bill of Exceptions.—Evidence.—The grounds of objections to the admissibility of evidence must be specifically stated to the trial court, and the bill of exceptions must exhibit them as stated, to present the question in the Supreme Court.

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139 146

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144 433

147 678

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164 338

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168 205

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169 151

74 520
171 491

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From the Carroll Circuit Court.

C. R. Pollard, L. E. McReynolds, J. R. Coffroth and C. B. Stuart, for appellant.

J. Applegate and N. O. Ross, for appellee.

ELLIOTT, J.—The questions, which the record of this case presents, arise upon the ruling denying appellant's motion for a new trial.

William A. Lowery, the appellee's intestate, lost his life by drowning in the Wabash and Erie canal, at a point within, or near, the corporate limits of the city of Delphi. There was evidence tending to prove that the intestate's death was attributable to the negligence of the appellant in failing to place barricades about the dangerous place, or to guard it by signals or warnings of danger. There was also evidence tending to show that it was the duty of the city to properly protect passengers from danger, inasmuch as one of the public streets of the city either ran up to and across the dangerous place or terminated in very close and direct proximity to that point.

The appellee was permitted to prove, over the objection of the appellant, that the intestate left his family in a destitute condition. This evidence was incompetent. *Chicago, etc., R. W. Co. v. Bayfield*, 37 Mich. 205; *Pittsburg, etc., R. W. Co. v. Powers*, 74 Ill. 341; *The City of Chicago v. O' Brennan*, 65 Ill. 160; *Sherlock v. Alling*, 44 Ind. 184; *Pennsylvania R. R. Co. v. Books*, 57 Pa. St. 339; *Illinois, etc., R. R. Co. v. Baches*, 55 Ill. 379; *Shea v. Potrero, etc., R. R. Co.*, 44 Cal. 414. The appellee, however, insists that the objection to the admission of this evidence was not properly made, and that there is no question saved. The position of the appellee is, that, as the appellant stated no specific objections to the evidence, his exception was fruitless. The bill of exceptions contains this statement: "At the proper time, the said defendant, before the trial began, moved the court to

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suppress certain questions in the depositions of witnesses," who are named, and the questions and answers designated; and the bill then proceeds: "And the defendant then and there pointed out the reasons to the court for said motion." We think this is not a sufficient statement of the grounds of objection. In the case of *Russell v. Branham*, 8 Blackf. 277, it was said: "We are not informed, by the record, what the particular objection was, and we can not, therefore, notice it. The defendants should have informed the circuit court of the ground of their objection, and when their motion was overruled, they should have taken care to have had such ground of objection made a part of the record. *Camden v. Doremus*, 3 How. 515." This doctrine has, by a long and unwavering line of decisions, been ingrained into our system of procedure as one of its fundamental principles. The party must state specifically his grounds of objection, and the bill of exceptions must exhibit them as stated. Unless this rule is adhered to, we would often have cases where one ground of objection was stated in the court below, and another and a different one urged upon appeal.

The appellee was permitted to prove that no barricades or warnings of danger were placed about the point where the public street of the city intersected or approached the canal. We think there was no error in this. There was some evidence tending to show that the place where the deceased was drowned was within the corporate limits, and that the street ran to the canal at the point where he attempted to cross. Conceding, however, that this was not so, it certainly was shown that the street of the city, as usually travelled, approached very near the canal, and that the appearances were such as would have indicated to a man of ordinary prudence, that it was the usual crossing place. If there is a dangerous place in or near the usually travelled part of the highway, the municipal authorities must use ordinary care to protect persons who make lawful use of the street,

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in a reasonably prudent manner, from injury. The duty resting upon the municipality is not fully discharged by making the travelled part of the highway safe, but such measures as ordinary prudence requires must be taken to prevent persons, using ordinary care, from falling into dangerous places along the sides, or in close proximity to the termination, of the highway of the municipality. *Alger v. City of Lowell*, 3 Allen, 402; *Murphy v. Gloucester*, 105 Mass. 470; *Davis v. Hill*, 41 N. H. 329; *Palmer v. Andover*, 2 Cush. 600; *Niblett v. The Mayor, etc.*, 12 Heisk. Tenn. 684; *Hey v. Philadelphia*, 81 Pa. St. 44; *Higert v. The City of Greencastle*, 43 Ind. 574.

Evidence was given by the appellee, that other persons had received injuries at the place where the deceased was drowned, at times anterior to his death. This the appellant contends, with vigor and ability, was erroneous. There is some conflict in the authorities. In *Collins v. The Inhabitants of Dorchester*, 6 Cush. 396, such evidence was declared incompetent. It was said to be "Testimony concerning collateral facts, which furnished no legal presumption as to the principal facts in dispute, and which the defendants were not bound to be prepared to meet." In support of the conclusion of the court, the following authorities were cited: *Standish v. Washburn*, 21 Pick. 237; 2 Stark. Ev. 381; 1 Greenl. Ev., secs. 52, 448. The cases of *Aldrich v. Pelham*, 1 Gray, 510; *Kidder v. Dunstable*, 11 Gray, 342; *Blair v. Pelham*, 118 Mass. 420, assert substantially the same doctrine as *Collins v. Dorchester*, *supra*.

In *Darling v. Westmoreland*, 52 N. H. 401, the doctrine of *Collins v. Dorchester* is vigorously assailed in an unusually able and elaborate opinion, and the opposite doctrine declared to be correct, both upon reason and authority. In the recent case of *Moore v. The City of Burlington*, 49 Iowa, 136, the court adopted in effect, although not expressly, the rule declared in the New Hampshire case. The

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Supreme Court of Illinois declared, in the case of *The City of Chicago v. Powers*, 42 Ill. 169, that such evidence was competent. It was said in that case: "It is insisted that the court erred in admitting evidence that another person had fallen through the same bridge. If this evidence was admissible for any purpose then it was not error. The action was based upon the negligence of the city in failing to keep the bridge properly lighted. If another person had met with a similar fate, at the same place, and from a like cause, it would tend to show a knowledge on the part of the city, that there was inattention on the part of their agents having charge of the bridge, and that they had failed to provide further means for the protection of persons crossing on the bridge. As it tended to prove this fact, it was admissible; and, if appellants had desired to guard against its improper application by the jury, they should have asked an instruction limiting it to its legitimate purpose." In *Kent v. The Town of Lincoln*, 32 Vt. 591, it was held competent to prove that other persons than the complainant had, at previous times, been injured by the same defect in a highway. A similar ruling was made in the case of *Quinlan v. The City of Utica*, 11 Hun, 217. This case was affirmed without comment by the Court of Appeals, 74 N. Y. 603. In *City of Augusta v. Hafers*, 61 Ga. 48, S. C. 34 Am. R. 95, the doctrine maintained by the cases cited was declared and enforced. The Supreme Court of the United States, in *The Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, held that it was competent for the plaintiff, in an action for injury resulting from fire communicated by the locomotives of a railway company, to prove that, during the summer preceding the burning of plaintiff's property, fire was often scattered from the locomotives of the defendant when passing plaintiff's property. In *Hoyt v. Jeffers*, 30 Mich. 181, it was held proper to prove that sparks had, at other times than that on which the injury sued for occurred, been emitted from a

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chimney. The doctrine of the cases cited is supported by many adjudged cases, among them: *Aldridge v. The Great Western R. W. Co.*, 3 M. & G. 515; *Huyet v. Philadelphia, etc., R. R. Co.*, 23 Pa. St. 373; *St. Joseph, etc., R. R. Co. v. Chase*, 11 Kan. 47; *Longabaugh v. The Virginia City, etc., R. R. Co.*, 9 Nev. 271; *Pennsylvania R. R. Co. v. Stranahan*, 79 Pa. St. 405; *Annapolis, etc., R. R. Co., v Gantt*, 39 Md. 115; *Dougan v. Champlain, etc., Co.*, 56 N. Y. 1; *Field v. The New York, etc., R. R. Co.*, 32 N. Y. 339.

This court has adopted and enforced this doctrine. In the case of *The Pittsburgh, etc., R. W. Co. v. Ruby*, 38 Ind. 294, this question was exhaustively discussed, and the point expressly ruled. It was there held that evidence of specific facts was competent for the purpose of charging the corporation with notice. We are unable to perceive any difference in principle between the case in hand and the class of cases of which those last cited are types. If specific acts are proper for the purpose of showing notice to the owners of machinery or the employers of servants, it must be competent for the purpose of showing notice to a municipal corporation, that there is a dangerous place within or very near the limits of the highway. The cases directly ruling the point here under immediate mention outweigh the cases in Massachusetts, for the latter are all built upon a single and not very carefully considered case. The doctrine of the cases in that court can not be reconciled with the doctrine of the class of cases represented by *The Pittsburgh, etc., R. W. Co. v. Ruby*. This last doctrine has been recognized as sound by the Supreme Court of Massachusetts, and that court, able and distinguished as it confessedly is, has, it seems to us, thus sanctioned a doctrine inconsistent with that of *Collins v. Dorchester*. *Gahagan v. Boston, etc., R. R. Co.*, 1 Allen, 187; *Ross v. Boston, etc., R. R. Co.*, 6 Allen, 87. It also seems to us that the doctrine of *Collins v. Dorchester* can not be harmonized with *Crosby v. Boston*, 118 Mass. 71,

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but we deem it unnecessary to prolong this opinion by a discussion of the conflict between these two cases.

There was no error in permitting the appellee to read in evidence the record of the common council showing the report of a committee appointed by that body, and the action taken thereon.

We are aware that this point has been differently ruled by the Supreme Court of Massachusetts in *Dudley v. The Inhabitants, etc.*, 1 Metcalf, 477, and *Collins v. Dorchester, supra*. The municipal corporation is represented by the common council, and the acts of that body done in regular session, and within the scope of the powers conferred by the charter, are binding upon the corporation. Corporations can act only by agents, and certainly the authorized acts of the highest class of corporate agents in the discharge of the duties of their agency are competent against the principal. We are at a loss to imagine a higher degree of evidence than that supplied by the official acts of the common councilmen, performed in regular session of the municipal legislature. The Massachusetts rule is unsound upon principle, and is opposed by the very decided weight of authority. *Requa v. The City of Rochester*, 45 N. Y. 129, on p. 137; *The City of Chicago v. Powers, supra*; *Thornton v. Camp-ton*, 18 N. H. 20; *Monaghan v. The School District, etc.*, 38 Wis. 101; *Erd v. City of St. Paul*, 22 Minn. 443.

In criticising instructions given by the court, counsel say that many of them are erroneous for the reason that they assume the existence of disputed facts, and the particular parts of the instructions complained of are specifically pointed out. We have examined the instructions, and are unable to agree with appellant's counsel upon this point. The discussion of the rulings upon the evidence disposes for the most part of all the questions arising upon the instructions except the questions presented by the instructions upon the subject of damages to be awarded in case of re-

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covery. The fifth instruction given by the court is as follows: "If you find for the plaintiff, in assessing her damages, you may take into consideration the age of the deceased, his habits and occupation, and from all the facts determine what amount the plaintiff should recover, not exceeding five thousand dollars." This instruction, as applied to the facts which the court permitted the appellee to prove, was erroneous.

Where, as here, facts are allowed to go in evidence, which furnish an incorrect basis for the assessment of damages, an instruction which directs the jury to determine from "*all the facts*" the amount of recovery is erroneous. The jury are not to determine the amount of recovery from all the facts, but only from such facts as form proper elements for consideration in computing damages. Where there are facts given in evidence, which would, if considered by the jury in determining the amount of damages, necessarily lead to an incorrect assessment, it is wrong to instruct the jury that it is their duty to consider "*all the facts.*" In the present case, evidence was allowed to go to the jury of the destitute condition of the family of appellee's intestate, and the instruction directed the jury to consider "*all the facts,*" and, of course, the direction embraced this among other facts. The evidence of this fact was unquestionably emphasized by its going to the jury over the objection of the appellant. In directing the jury to consider "*all the facts,*" they were required to consider the fact that the appellee's intestate left his family in poverty and want, and this was an element which ought not to have entered into the consideration of the jury. If the intestate had died the richest of men, it could not have decreased the damages, and, if he had died the poorest, it could not have enhanced them. There are not two measures, one for the kinsmen of the poor, and one for the kinsmen of the rich; there is one standard only, and that is for all, the rich and the poor alike.

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There are, in almost every case, facts which are proper for consideration upon some of the controverted questions, but which are not proper upon the question of the measure of damages. Excluding from consideration the clearly incompetent fact that the family of the deceased were in destitute circumstances, there are other facts which ought not to have been considered in estimating the amount of recovery; notably so the fact that others had been injured at the place where the deceased met his death. This evidence, although competent upon the question of notice, was not an element for consideration in the admeasurement of damages, yet was embraced within the wide-sweeping language of the court. An ordinary juror, deeming himself authorized to consider the fact that others had received injuries from the same cause, would be very likely to allow damages as a punishment. The fact that the negligence of the municipal authorities had entailed suffering upon others would inflame the passions and bias the judgments of the jurors. Where there are facts given in evidence which ought not to be considered in estimating damages, the instructions of the court should inform the jury what facts should be considered by them in making their estimate, and not leave it to them to take into account facts which have no legitimate bearing upon that branch of the case. *Chicago, etc., R. R. Co. v. Becker*, 76 Ill. 25; *Steel v. Kurtz*, 28 Ohio St. 191; *Blake v. The Midland R. W. Co.*, 10 Eng. L. & Eq. 437; *Telfer v. The Northern R. R. Co.*, 30 N. J. L. 188.

The jury have, to be sure, a very broad discretion upon the subject of damages. *The City of Indianapolis v. Scott*, 72 Ind. 196; *The Indianapolis, etc., R. R. Co. v. Stout*, 53 Ind. 143. Broad as this discretion is, it is to be exercised upon proper facts. Improper elements, influencing not the judgment, but the passions or prejudices, should not form any part of the elements, out of which the judgment of the jurors is to be constructed. When the facts proper for considera-

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tion are submitted by the court, the question of the amount of damages is one for the sound judgment of the jury. Where, however, the facts submitted are such as form an erroneous foundation for the minds of the jurors to build conclusions on, there can, in all probability, be no just result, even though the jurors build never so wisely.

For the error committed in giving this instruction, the judgment is reversed at the costs of appellee.

Petition for a rehearing overruled.

No. 7097.

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PROMISSORY NOTE PAYABLE IN BANK.—Accommodation Indorser.—Presumption as to Liability.—Indorsee.—Payee.—The liability of one who indorses mercantile paper, before its indorsement by the payee, is *prima facie* that of a strict indorsement, which will not operate in favor of the payee, but of his indorsee only.

SAME.—Indorsement before Delivery.—Parol Evidence.—Maker.—Surety.—If such indorsement be made before delivery of the paper, and for the purpose of giving it credit with the payee, it will create a liability, in favor of the payee, *prima facie* of indorsement; but parol evidence is admissible to show that the liability, mutually intended, was that of a maker or surety. *Sill v. Leslie*, 16 Ind. 236, distinguished.

SPECIAL FINDING.—Conclusions of Law.—The office of a special finding is to state the facts proved, not items of evidence merely; and the statement of legal conclusions, upon such a finding, should embrace matters of law only, and not matters of fact. If, in the finding, items of evidence only are stated, instead of the fact which ought to be found, and if the statement of the legal conclusions embraces matters of law, and also matters of fact which ought to have been found as such, a *venire de novo* will be granted.

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F. M. Finch and *J. A. Finch*, for appellants.

L. D. McClain and *A. F. Denny*, for appellee.

WOODS, J.—The error assigned is that the court at general term erred in reversing the judgment at special term.

The suit was brought by the appellee against the appellants and James A. Kealing, upon a promissory note made by said James to the appellee, whereby one year after date of August 4th, 1875, said James promised to pay to the order of the appellee seven hundred and fifty dollars, value received, payable at Fletcher & Sharpe's bank, at Indianapolis, without any relief from valuation or appraisement laws, with ten per cent. interest. The appellants indorsed their names on this note before its delivery to the payee. The complaint is in several paragraphs, and seeks in one to charge the appellants, as sureties for the maker, in another as guarantors, and in another as indorsers. The court, by request, made a special finding, and stated its conclusions of law thereon as follows:

“That on the 4th day of August, A. D. 1875, the said defendant James A. Kealing delivered to the plaintiff, Vansickle, a promissory note for the sum of seven hundred and fifty dollars, payable twelve months after date, with ten per cent. interest; that said note was commercial paper, payable in bank, and had the name of the defendant James A. Kealing signed at the bottom, and the names of the defendants Samuel Kealing and John Kealing signed on the back thereof; that upon said note, thus signed, the plaintiff loaned said James A. Kealing the sum of seven hundred and fifty dollars, of which said Samuel and John received no part, having signed said note for the accommodation of said James A. Kealing; that the plaintiff did not see said defendants Samuel and John sign said note, nor have any conversation with them, or either or them, until after the maturity of said note, and but a short time prior to the commence-

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ment of this action; that said note was not protested at maturity, nor other notice of non-payment thereof given to the defendants Samuel and John; that no part of the principal or interest of said note has been paid; that long after the maturity of the note, and a short time before the commencement of this action, in two different conversations, Samuel and John Kealing stated that they were security for their brother James upon said note; that, in a separate conversation since this suit was commenced, the defendant John stated that he was security for James upon said note; that, a short time prior to the commencement of this suit, both Samuel and John offered to become security for James A. upon a new note running eighteen months, which the plaintiff declined to accept."

And as matters of law the court finds: "That said Samuel and John Kealing are *prima facie* endorsers upon said note, and James A. Kealing is the maker; that said Samuel and John endorsed said note before the same was delivered to the payee; that said note has not been negotiated, but is still owned by the payee; that the proof does not show that Samuel Kealing and John Kealing, by their indorsement of said note, intended to bind themselves as sureties, or in any other or different character than as endorsers; that, by the neglect of the plaintiff to notify said Samuel and John of the non-payment of said note at maturity, they were discharged from liability thereon; that said Samuel and John have not, by any new promise or admission, waived their rights to insist upon such discharge from liability in this action; that the plaintiff is entitled to judgment for the full amount due on the note against James A. Kealing, and said Samuel and John are entitled to judgment for costs."

To each of these conclusions the plaintiff excepted, and filed motions for a *venire de novo*, and for a new trial, and reserved exceptions to the overruling thereof.

The court, at special term, gave judgment according to

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the conclusions of law as stated, but this judgment the court at general term reversed as to said Samuel and John Kealing, and ordered judgment against them for the full amount due on the note. In explanation of the theory on which the court reached its conclusion, from which one of the judges dissented, we make the following extract from the opinion of the majority of the court: "It is apparent, then, that *prima facie* John and Samuel Kealing were endorsers on the note sued on, and it is also true that this presumption may be removed by parol evidence to the contrary. Do the facts as found by the court establish the relation of these defendants to be sureties rather than indorsers? In our opinion they do. On the one hand is the presumption of the law, unsupported by any circumstance or fact, while on the other is the affirmative evidence of their admissions, that they signed as security for their brother, and for his accommodation alone. The term 'security' is synonymous with 'surety.' * * * In *Sill v. Leslie*, 16 Ind. 236, (see, also, *Robison v. Lyle*, 10 Barb. 512,) the presumption * * * of the liability of an indorser, and nothing more, was held to be overcome by evidence that the presumed indorser had, in a conversation with the plaintiff, and in response to a question by him, if he did not sign the note, replied: 'Yes, he signed as surety.'

"We are of opinion, therefore, upon the facts as found by the court, that the defendants John and Samuel Kealing assumed the relation of sureties on the note in suit, and as such were not entitled to notice of non-payment thereof, but are liable jointly with their principal, James A. Kealing."

We do not dissent from the proposition of law advanced by the superior court in reference to the *prima facie* liability of the indorser in such cases being controllable by proof that a different liability was intended, *Browning v. Merritt*, 61 Ind. 425; but we think that a proper analysis of the facts

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found will not warrant the conclusion reached, that a different liability was intended by the parties in this case.

In the first place, it is a mistake to say, that, "on the one hand is the presumption of law, unsupported by any circumstance or fact." It is found expressly, that the plaintiff did not see said defendants Samuel and John sign said note, nor have any conversation with them, or either of them, until after the maturity of the note, and but a short time before the commencement of this action; and as it is the office of a special finding to state what was proven, *Ex Parte Walls*, 73 Ind. 95, it is impliedly found that no communication passed between the parties, showing that said defendants intended to incur, or that the plaintiff intended to accept from them, any other liability than what was apparent from the paper itself.

The character of the contract in question became fixed at the moment of its complete execution, that is, upon its delivery to the plaintiff, and nothing done or said by either party at a subsequent time, could change that character though it might be used as evidence on the subject. Whether the contract was one of endorsement or suretyship depended, not on the intent of one of the parties, but on the mutual understanding and intent of both. This kind of contract is not an exception to the rule which requires the consent of both parties; and unless, therefore, it is made apparent from the facts found that both the plaintiff and said defendants Samuel and John intended that their liability should be that of suretyship, the conclusive legal presumption is that they all intended a contract of indorsement. The paper, as delivered, evidences that contract, and, in the absence of evidence of a different mutual understanding, must, from necessity, be deemed controlling. Now, it certainly can not be inferred, as a legal conclusion, from the facts found, that there was a mutual understanding between the parties at the time the note was delivered to the plaintiff and

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he advanced his money thereon, that the indorsers should be bound by any other contract than that evidenced by the note and indorsements as delivered.

Suppose that, instead of being as it is, the note had contained a clause waiving presentment for payment, protest, and notice thereof, and that the plaintiff was seeking to hold them as indorsers, could it be successfully asserted that on the facts as found (with the exception supposed) said defendants were not indorsers, but sureties only?

Sill v. Leslie, cited *supra*, does not go to the extent claimed for it. The note in that case was executed in the same form as the note in this case, but the complaint in a single count charged all the defendants as makers. The verdict was general, not special, and on the evidence stated, this court refused to disturb the verdict for the plaintiff. This is by no means equivalent to saying, as matter of law, that such a declaration of one of the parties overcomes the legal presumption arising from the form of the contract. In that case the complaint, which declared on the contract as one of suretyship only, may have been deemed to manifest the plaintiff's understanding that such was the contract, and, the defendant having so declared his understanding, there was evidence on which the jury may well have inferred that the parties mutually so understood the contract when it was made. Indeed, as a question of evidence, arising upon an appeal, the declaration of the defendant, as proven in that case, was in itself, without reference to the complaint, sufficient to sustain the verdict; but this is quite different from saying, as matter of law, that it was sufficient to require the verdict which was found. In the case at bar there is no finding, nor anything in the pleadings, from which it can with any certainty be inferred, that the plaintiff regarded the liability of said defendants as anything else than that of indorsers. The complaint charges them in the three capacities of indorsers, sureties and guarantors, and furnishes no

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ground for an inference of the plaintiff's original understanding and intention; and, as already stated, having received the paper, without notice that the indorsers intended anything else than indorsement, the only reasonable, if not the conclusive, presumption would seem to be that he accepted the paper, intending to hold them as indorsers only. This, however, is a question of evidence, to be determined by the court or jury which shall try the case, according to the proof made.

Aside from these considerations, the order of the court in general term, that judgment be given on the special finding for the plaintiff against said Samuel and John, for the full amount of said note, was erroneous.

The special finding and the conclusions of law thereon are not properly constructed. The finding, in part, does not find the fact, but only evidence thereof, and the conclusions of law as stated are not matters of law entirely, but in part are matters of fact which should have been found as such. In so far as the finding shows that the plaintiff did not see said Samuel and John sign the note, and had no conversation with them until after the maturity thereof, and that said defendants stated in two conversations that they were security for their brother on said note, it is a finding, not of fact in any proper sense, but only of items of evidence which tend to show the fact which ought to have been found as such, namely, the capacity in which the parties mutually intended that said Samuel and John should be bound. There was no harm in, though no necessity for, stating these items of evidence in the finding, but without stating the conclusion of the court in reference to the ultimate fact which was in issue, according as the court deemed the evidence to preponderate, the finding was imperfect.

The court did find, "as matter of law," that said Samuel and John Kealing are *prima facie* indorsers upon said note, and that the proof does not show that by their indorsement

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they intended to bind themselves as sureties, or in any other or different character than as indorsers ; but their intention in this respect, as well as the intention of the plaintiff, was matter of fact which should have been found as such. It is plain that the finding of it as matter of law is not the equivalent of a finding of the fact as such.

On account of these defects in the finding, and in the statement of legal conclusions, instead of ordering judgment for the plaintiff as against said Samuel and John, the order should have been that the motion for a *venire de novo* be granted as to said defendants.

The judgment is therefore reversed, with costs, and with instructions to grant the motion for a *venire de novo* as to the said defendants Samuel and John Kealing.

ON PETITION FOR A REHEARING.

WOODS, J.—A rehearing is asked on the ground that the fact stated in the finding, that John and Samuel Kealing indorsed the note before its delivery to the payee, for the accommodation of James A. Kealing, who alone received of the payee the consideration of the note, is equivalent to a finding that said John and Samuel intended to become, and were accepted by the payee as, original makers, liable jointly with, or as sureties for, said James.

After a careful and painstaking examination of the decisions throughout the United States, and a study of such English cases as they could find, the counsel for the appellee deduce the following rule in reference to the liability of indorsers who sign before an indorsement of the paper by the payee : “Where oral evidence is at all admissible to show the character of the liability of such indorsers, and where the indorsement was made solely to give credit to the maker with the payee, and for the accommodation of the maker, the indorser is regarded holden and bound as a surety for

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the maker ;” and, concluding the discussion, the counsel add: “In this case it is utterly indifferent to us whether the rule of *prima facie* liability be that of makers or that of indorsers. The vital principle is, that when the indorsement is made with the intention to give the maker credit with the payee, then the liability of the indorser is that of a surety for the maker. And this liability is clearly shown by the special finding here.”

The cases cited, and which might be cited, on this subject are numerous, and, if not full of confusion and contradiction, are, in many respects, variant and difficult to harmonize. We shall not attempt the task. See *Chaddock v. Vanness*, 35 N. J. 517 ; S. C., 10 Am. Rep. 256 ; *Vore v. Hurst*, 13 Ind. 551 ; 1 Daniel Negotiable Instruments, secs. 709–716, and notes. The following are the latest cases, besides our own, cited by counsel: *Jaffray v. Brown*, 74 N. Y. 393 ; *Coulter v. Richmond*, 59 N. Y. 478 ; *Fear v. Dunlap*, 1 Greene, Iowa, 331 ; *Billingham v. Bryan*, 10 Iowa. 317 ; *Arnold v. Bryant*, 8 Bush, 668 ; *Jones v. Goodwin*, 39 Cal. 493 ; *Ford v. Hendricks*, 34 Cal. 673 ; *Eilbert v. Finkbeiner*, 68 Pa. St. 243 ; *Collins v. Everett*, 4 Ga. 266 ; *Cogswell v. Hayden*, 5 Oreg. 22 ; *Milton v. De Yampert*, 3 Ala. 648 ; *Jennings v. Thomas*, 13 Sm. & M. (Miss.) 617, showing the *prima facie* liability to be that of an indorser ; but the following showing it to be *prima facie* the liability of maker or guarantor: *Killian v. Ashley*, 24 Ark. 511 ; *Good v. Martin*, 2 Col. 218 ; *Clark v. Merriam*, 25 Conn. 576 ; *Gilpin v. Marley*, 4 Houst. 284 ; *Parkhurst v. Vail*, 73 Ill. 343 ; *Fuller v. Scott*, 8 Kan. 25 ; *McGuire v. Bosworth*, 1 La. An. 248 ; *Woodman v. Boothby*, 66 Me. 389 ; *Ives v. Bosley*, 35 Md. 262 ; *Way v. Butterworth*, 108 Mass. 509 ; *Rothschild v. Grix*, 31 Mich. 150 ; *Stein v. Passmore*, 25 Minn. 256 ; *Western, etc., Association v. Wolff*, 45 Mo. 104 ; *Baker v. Robinson*, 63 N. C. 191 ; *Seymour v. Mickey*, 15 Ohio St. 515 ; *Perkins v. Barstow*, 6 R. I. 505 ; *Carpenter v. Oaks*, 10 Rich. 17 ; *Harrison v. Sheirburn*, 36

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Tex. 73 ; *Orrick v. Colston*, 7 Grat. 189 ; *Burton v. Hansford*, 10 W. Va. 470 ; *Sylvester v. Downer*, 20 Vt. 355 ; *Gorman v. Ketchum*, 33 Wis. 427 ; *McGee v. Connor*, 1 Utah, 92 ; *Rey v. Simpson*, 22 How. 341 ; *Good v. Martin*, 95 U. S. 90 ; *Matthews v. Bloxsome*, (Q. B.) 10 L. T. Rep., N. S. 415.

It is well settled, in this State, that the *prima facie* liability is that of indorsement. *Wells v. Jackson*, 6 Blackf. 40 ; *Early v. Foster*, 7 Blackf. 35 ; *Harris v. Pierce*, 6 Ind. 162 ; *Cecil v. Mix*, 6 Ind. 478 ; *Vore v. Hurst*, 13 Ind. 551 ; *Sill v. Leslie*, 16 Ind. 236 ; *Snyder v. Oatman*, 16 Ind. 265 ; *Drake v. Markle*, 21 Ind. 433 ; *Dale v. Moffitt*, 22 Ind. 113 ; *Houston v. Bruner*, 39 Ind. 376 ; *Roberts v. Masters*, 40 Ind. 461 ; *Bronson v. Alexander*, 48 Ind. 244 ; *Schulz v. Klenk*, 49 Ind. 212 ; *Nurre v. Chittenden*, 56 Ind. 462 ; *Browning v. Merritt*, 61 Ind. 425.

The doctrine, as deduced from a consideration of the Massachusetts, New York and English cases, was stated in *Wells v. Jackson*, *supra*, in the following language: "That the blank indorsement of unnegotiable paper, made at the date of the contract, and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable on the original contract, as a surety ; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as indorser, with the original rights and privileges incident to that character. But that, in either case, the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind. And this appears to us to be also the common-sense view of the subject."

This statement of the doctrine has been sometimes quoted and repeatedly recognized, and never condemned or criticised, in the later cases ; but whether it has been uniformly understood and applied in the sense in which it was understood and applied in the case where it is found, is not clear.

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As stated, the rule is made ambiguous, or at least capable of two constructions, by reason of a change of the form of the expression in the two clauses of the first sentence. In the first clause it reads, "confers on the payee the authority to hold the indorser liable on the original contract, as a surety;" but, instead of continuing the same form of expression in the second clause, and saying, "authorizes the payee to hold," etc., it says, "renders the indorser liable only as indorser."

Just here seems to be the pivotal point of the discussion. The position taken by the counsel for the appellee is, and the cases which support it assume, that such an indorser cannot be liable as an indorser to the payee of the paper. This, of course, implies the further assumption of the corollary proposition, that such an indorser, if liable to the payee at all, must be liable as a joint maker, surety, or guarantor—any thing but indorser. This much assumed, the conclusion is easy and logical, that a finding which shows that the indorsement was made in order to give the maker credit with the payee, is equivalent to a finding that the indorser intended to become liable to the payee; and, as his liability cannot be that of indorsement, it is either suretyship or guaranty. In this case we are asked to call it suretyship rather than guaranty, because it was held, in *Drake v. Markle*, *supra*, that the statute of frauds forbids parol proof in such a case of an intended guaranty. But the effect of this ruling, if upheld, as we conceive, must be, not that the indorser who may have intended to assume the liability of a guarantor, will be held as a surety instead, but rather that, the actual intention being nullified by force of the statute, the parties will be remitted to the presumptive *prima facie* obligation of indorsement.

We might stop here, therefore, and, upon his own theory, hold the appellee not entitled to a judgment in his favor upon the finding made, because it does not appear whether the indorsers intended to accommodate the maker and give

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him credit with the payee as sureties, or as guarantors. If as guarantors, aside from the statute of frauds, they are not liable except upon proof of a demand on the maker, and notice of non-payment within a reasonable time after the default, or proof that no harm had or reasonably could have accrued to them on account of the failure to make the demand and give them notice thereof. *Gaff v. Sims*, 45 Ind. 262; *Cole v. The Merchants Bank, etc.*, 60 Ind. 350; 2 Daniel Negotiable Instruments, 662, sec. 1,787.

We prefer, however, not to rest our decision here. We think the assumption that an indorser may not be liable as such to the payee of a note, however seemingly well supported by the authority of decided cases, is not in accordance with sound reason, with "the common-sense view of the subject," nor with the drift or status of the decisions of this court, especially of the later cases. What is there in the terms or in the nature of the obligation of the contract of indorsement, which forbids its operation in favor of the payee of a note as well as in favor of an indorsee in the strict sense? A regular "indorsement, when made for an adequate consideration, passes the interest of the indorser, and amounts to an undertaking, unless qualified in express terms, that if the bill or note is not paid at maturity, and the indorser has due notice of dishonor, he will pay it, which in law is a contract in favor of the indorsee, and every holder to whom the note or bill is transferred." Chitty Bills, 241; Story Notes, sec. 135; Edwards Bills, 272-284; *Chaddock v. Vanness, supra*. The indorsement of one who signs before indorsement by or delivery to the payee, of course, makes no transfer of interest or title in the note, but there is no reason why it may not evidence an undertaking by the indorser to the payee or holder, that if the note is not paid by the maker, and the indorser has due notice of the dishonor, he will pay it to the payee as well as to his indorsee. There can be no doubt that, if written out in full over

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the indorsed name, such a contract would be in all respects valid and effective, and the liability would be exactly the same as that of an indorser; and, it being established that parol evidence is admissible to show what contract the parties intended, it should be admissible to show this, as well as a contract of suretyship or of guaranty. The primary presumption, let it be granted, is a strict indorsement, which will not operate in favor of the payee, but of his indorsee only, such indorser being liable only as second indorser, and entitled to recourse against both the maker and the payee who becomes the first indorser; but if the evidence show that the indorsement was made before delivery to the payee and for the maker's accommodation, or to give him credit with the payee, then the indorser is liable directly to the payee, *prima facie*, as indorser, or if the proof be such as to show it, then as surety.

That such indorser may be liable to the payee as indorser counsel concede to be the ruling in Alabama and Mississippi. *Milton v. De Yampert*, 3 Ala. 648, and *Jennings v. Thomas*, 13 Sm. & M. 617. To the same effect as we understand them, are the decisions in California, where such an indorser is called a guarantor, but his liability, which is enforced in favor of the payee, is held to be the same as that of indorser. *Clarke v. Smith*, 2 Cal. 605; *Ford v. Hendricks*, 34 Cal. 673; *Jones v. Goodwin*, 39 Cal. 493. Besides the quotation already given, the following language is used in *Wells v. Jackson*, *supra*, to wit: "The defendant is the last of three indorsers, and must be presumed, agreeably to the principles laid down, to have placed his name upon the bond in the character of an ordinary indorser, looking to the responsibility of those whose names precede his, including the payee and maker. As the count under consideration attempts to hold the defendant primarily liable, it is defective." This decides, that the *prima facie* obligation in such case is as second indorser, but it is not a decision even by implication

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that there may not be a liability as indorser in favor of the payee. In *Early v. Foster*, 7 Blackf. 35, in an opinion prepared by the same judge who wrote the opinion in *Wells v. Jackson*, after saying that the “unexplained indorsement of the note, made at its date, did not render” the indorser primarily liable, as a joint maker, to the payee, the court adds: “And he is not shown to be responsible as an indorser, so as to render him jointly liable with the maker, under the statute;” strongly intimating, if not absolutely implying, an understanding on the part of the court, that he was liable to the payee as indorser, though not shown to be liable jointly with the maker under the statute. The same understanding is manifest in most of the decisions made by this court since that time, while the cases of *Bronson v. Alexander*, 48 Ind. 244, and *Nurre v. Chittenden*, 56 Ind. 462, are totally irreconcilable with the position that such an indorsement, made before delivery and for the accommodation of the principal obligor, is an original undertaking or contract of suretyship, but on the contrary they are in entire harmony with, and indeed can be upheld only upon, the doctrine that the indorser may be liable as such to the payee, and if liability to the payee be shown to have been intended, it will be presumed to be as indorser, unless the evidence shows affirmatively that a different contract was intended.

In accord with these views, we subjoin the following quotations from Mr. Daniel’s work on Negotiable Instruments, already cited. He says: “Sec. 710. * * Whatever diversities of interpretation may be found in the authorities on the subject, they very generally concur, though not with entire unanimity, that, as between the immediate parties, the interpretation ought to be, in every case, such as will carry their intention into effect, and that their intention may be made out by parol proof of the facts and circumstances which took place at the time of the transaction. If the person who places his name on the back of the note before the payee in-

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tended at the time to be bound to the payee only as a guarantor of the maker, he shall not be deemed to be a joint promisor, or an absolute promisor to the payee. If he intended to bind himself as a surety or joint maker of the note, he will not be permitted to claim afterward that he was only a guarantor. And if he intended to be bound only as an indorser, the better opinion is that this also may be shown as between him and the payee.

“Sec. 714. It would seem to us that such a party ought to be regarded as a first indorser. If he intended to be a second indorser, he should have refrained from putting his name on the note until it was first indorsed by the payee. By placing it first he enables the payee to place his own afterward; and *prima facie* the facts would seem to indicate such intention. There is nothing in the objection that there is no title in him to indorse away. Prior parties could not be sued without the payee's indorsement; but he being an indorser can be sued by any one deriving title under him. In fact, his position seems to render his liability strictly analogous to that of the drawer of a bill upon the maker in favor of the payee; and so to regard him simplifies, as it seems to us, a question which, unless such analogy be followed, is exceedingly complicated and difficult. * *

“Sec. 715. What parol evidence determines the liability of the person signing before the payee is also a matter upon which opinion is diverse. Many authorities take the ground that when it appears that the note was intended for the payee, or that the name was placed upon the back of the note before its delivery to the payee, that circumstance fixes the liability contracted as that of joint maker, and excludes further inquiry. But this does not seem to us sufficient,” etc.

“Sec. 716. When the note is sued upon by the payee, it is held that the idea of the party before him being bound as an indorser is excluded. But this doctrine does not seem to us correct. The indorsement, it is true, is an irregular one;

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but it is quite similar to a bill drawn by the indorser on the maker, and to follow that analogy in all regards seems to us the simplest and most reasonable solution of the question. And there are a number of cases which regard such a party's liability as *prima facie* that of an indorser." The cases cited under the last proposition are: *Price v. Lavender*, 38 Ala. 389; *Comparree v. Brockway*, 11 Humph. 355; *Clouston' v. Barbieri*, 4 Sneed, 335; *Jennings v. Thomas*, 13 Sm. & M. 617; *Kamm v. Holland*, 2 Oreg. 59; and the following of this court already cited *supra*: *Wells v. Jackson*; *Vore v. Hurst*; *Sill v. Leslie*; *Dale v. Moffitt*; *Roberts v. Masters*.

The petition is overruled, with costs.

ELLIOTT, J., absent.

No. 7779.

COOPER ET AL. v. METZGER.

PLEADING.—Harmless Error.—General Denial.—It is a harmless error to sustain a demurrer to an answer, when all the material facts averred therein are admissible in evidence under the general denial, also pleaded.

SAME.—Action on Bond.—Nominal Damages.—In an action on a replevin bond, an answer showing that the obligors, after breach, did an act taking away all right to recover anything more than nominal damages, is not a showing that there is no right of action at all on the bond.

JUDGMENT.—Sentence of Court may be Designated by Different Term.—Generally, a judgment is the decision of a controversy, given by a court of justice, between parties who do not agree, but a judicial sentence may be designated by a different term than judgment.

CONSTRUCTION OF STATUTE.—Rule of.—The intention of legislators and the purpose of a statute ought not to be made to yield to one or more phrases, when the whole act evinces a different intention and purpose.

ATTACHMENT.—Right of Creditor to File Claim Under Proceedings Terminates with Judgment.—Statute Construed.—The right of creditors to file claims under an attachment proceeding against a debtor, under section

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186 of the code, 2 R. S. 1876, p. 110, terminates with the final judgment and order of sale of the attached property, the words "final adjustment," as used in said section, meaning the judgment directing a recovery and ordering a sale of the property seized under the writ of attachment.

From the Knox Circuit Court.

J. S. Pritchett and *H. Burns*, for appellants.

G. G. Reily, *W. C. Johnson* and *W. C. Niblack*, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that the appellant Cooper instituted an action in the Knox Circuit Court against appellee, for the recovery of personal property; that, to obtain immediate possession of the property, Cooper, as principal, and the other appellants, as sureties, executed the written undertaking required by the statute; that the action instituted by Cooper was tried, and a judgment rendered adjudging a return of the property, or, if a return was not made by Cooper, that the appellee recover the sum of twelve hundred and fifty dollars; and that Cooper had neither returned the property nor paid the sum fixed by the judgment. As no question is made upon the complaint, we have given only a very general outline.

The questions first presented are those arising upon the ruling sustaining a demurrer to the first paragraph of appellants' answer. This answer expressly admits all of the material allegations of the complaint, and professes to avoid them. The material allegations contained in the answer may be stated, in substance, as follows: That on the 24th day of January, 1878, the defendant Holstein Cooper became the owner by purchase from Charles N. Cooper of the personal property described in the complaint; that on the 27th day of January, 1878, Richard W. Bishop and others commenced proceedings in attachment before a justice of the peace against Charles N. Cooper, the defendant's vendor, and secured a writ of attachment, which was levied on the said

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property on that day ; that on the 2d day of February, 1878, the cause wherein the attachment was issued was tried, and that other creditors of said Charles N. Cooper then filed claims under Bishop's proceedings ; that the trial resulted in a judgment in favor of all of the attaching creditors ; that the judgment was a final one, embracing the claims of all creditors who had filed claims prior to the judgment ; that the property was ordered to be sold ; that afterward, on the 2d day of March, 1878, while the property was in the hands of the officer under the attachment, but before it had been sold, the appellant Cooper instituted the action in which the undertaking sued on was executed ; that said action, wherein Cooper was plaintiff, was tried ; that the issue upon which it was tried was, whether the plaintiff, Jacob Metzger, had, as constable, the right to the possession of the property under the writs issued by the justice ; that upon the said issue judgment was rendered for the defendant in said action ; that, after the judgment had been entered in the case of Cooper against Metzger, the former paid all the costs of that action, and also paid in full the principal and interest of all claims included in the judgment rendered by the justice in the attachment proceedings.

The design of the pleader in framing the answer under mention was to clearly show that the action instituted by Cooper in the circuit court was tried upon the single issue of the right of Metzger, the constable, to hold possession of the personal property under the writs and orders issued in the attachment proceedings ; and the appellee, by his brief, impliedly confesses that the answer does do this, and we are not, therefore, required to consider whether the judgment of the circuit court can be deemed a full adjudication of the matters pleaded by the appellants.

The contention of the appellants is that the right of the constable to hold the property terminated with the payment in full of all claims included in the justice's judgment, and

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which had been filed prior thereto. That of the appellee is that the constable had a right to hold the property until final adjustment, and that the term "final adjustment," as used in the statute, means the order directing the distribution of the proceeds of the sale of the attached property; and that until such an order is made any creditor of the attachment debtor may come in and file his claim under the original proceedings. Involved in the general proposition of appellants is the subordinate one, that the right of creditors to file claims terminates with the judgment. Included within the general proposition of the appellee is the subordinate proposition, that the right of creditors to file claims and share in the distribution of proceeds of the sale of attached property does not terminate until the order directing a distribution of the proceeds of the sale of the attached property is made.

Before entering upon a discussion of the principal question, it is necessary to consider and dispose of an incidental one growing out of the peculiar allegations of the answer. The appellee argues that the answer does not show that the claims named therein were all that had been filed, and that it was for this reason, if for no other, bad. We think that the answer does show full payment of claims filed prior to and included in the judgment of the justice, and that the appellants were not bound to anticipate affirmative matter which would be proper by way of reply. But we do not think this a very material question. If the appellants are right upon this point, and are also right upon the principal question, no harm was done them in sustaining the demurrer; for, as the general denial was also pleaded, the appellants were entitled to give in evidence all the material facts stated in this answer. All that the facts pleaded entitle appellants to is a reduction of damages, even upon their own theory of the case. There was a breach of the bond, and a showing that the obligors, after breach, did an act taking away all right to recover any thing more than nominal dam-

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ages, is not a showing that there is no right of action at all on the bond.

The question which we have stated, and which we have said is the important and controlling one, is, however, fairly and directly presented by the special finding of facts and conclusions of law made and stated by the court. It is not necessary to state at much length the facts found by the court, for a brief synopsis will convey an adequate idea of the question of law which controls and disposes of the case. From the finding, these, among other material facts, may be gathered: That the attachment proceedings against Charles N. Cooper were commenced on the 28th day of January, 1878; that after the commencement of the proceedings other creditors filed claims; that, on the 1st day of February of said year, the justice rendered judgment in favor of all attaching creditors, sustaining the attachment and ordering a sale of the attached property; that this judgment included all claims that had been filed; that on February 8th, 1878, an order of sale was issued to Constable Metzger; that on the first day of March, 1878, the appellant Holstein T. Cooper obtained possession of the property under the writ issued by the Knox Circuit Court, in the action by him instituted against Metzger; that trial was had in said action, resulting in a judgment for appellee, as set out in the complaint in the present action; that this judgment was rendered on the 5th day of October, 1878; that no complete return was made to the order of sale issued to the constable until long after the date last given; that before September 12th, 1878, other creditors of Charles N. Cooper filed claims under the original attachment proceedings, and on that date obtained judgments thereon; that on the 12th day of October, 1878, Holstein Cooper paid the full amount of all claims filed prior to and included in the judgment of the justice, rendered on the 1st day of February of said year, but that he did not pay any part of the claims filed subsequent to the judgment

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of February 1st, 1878. We have outlined the material facts which are stated with much particularity in the special finding, and have not attempted to go very much into detail. Upon the facts found the court stated conclusions of law, but these we need not set out in full; but there are five of the conclusions stated which clearly present the theory upon which the case was tried, and these we copy. The conclusions of law to which we refer are as follows:

1st. "The lien acquired by virtue of the writ of attachment issued at the suit of Richard M. Bishop *et al.* against Charles N. Cooper, and the seizure under it by the said Metzger, as constable, of the goods replevied, enured to the benefit of all creditors of said Cooper who might file their complaints, affidavits and undertakings to the approval of the justice, in said suit, and thereby become parties to the suit before the final distribution of the proceeds of the sale among the attaching creditors whose claims had been legally established."

2d. "The rendition of the several judgments by the justice on February 1st, 1878, against Charles N. Cooper, upon the claims then filed, was not a final adjustment of the suit within the meaning of section 186 of the code of civil procedure."

3d. "The several plaintiffs filing their complaints, affidavits and undertakings with said justice, in said suit of Bishop *v.* Cooper, on and after September 12th, 1878, thereby became parties to said suit in attachment."

4th. "No return to the order of sale issued by the said justice having been made by the constable, when the several judgments rendered after September 12th, 1878, were recovered, those judgments were entitled to share *pro rata* with the judgment rendered on February 1st, 1878, in the avails of the goods ordered to be sold."

5th. "The sale being defeated by the replevin suit, and the failure of Holstein T. Cooper to return the goods to the constable, the assessed value of the goods (\$1,250) as as-

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certained in the replevin suit, would stand in place of the proceeds of the sale of the goods on the execution, and be subject to distribution by said justice in said attachment suit, among all said judgment creditors.”

The case turns upon the answer to the question: May a creditor come in under attachment proceedings after final judgment has been rendered and an order for the sale of the attached property made? The section of the code, which gives creditors a right to come in under pending attachment proceedings, contains the following provision: “Any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim.” 2 R. S. 1876, p. 110, sec. 186. The appellee insists that the term “final adjustment” means something more than final judgment, and refers to the final distribution of the proceeds derived from the sale of the attached property. The appellants, upon the other hand, maintain that the words quoted are to be taken as synonymous with the term “final judgment,” and that the right of creditors to file under the original attachment ceases when final judgment is entered.

It is true that the word “judgment” ordinarily means “the judicial sentences of courts, rendered in causes within their jurisdiction, and coming legally before them.” *Peirce v. City of Boston*, 3 Met. 520. In strictness, there can only be a judgment where there is a controversy, for “A judgment is the decision of a controversy, given by a court of justice, between parties who do not agree.” *Union Bank v. Marin*, 3 La. An. 34. It is in this sense that the term is generally used in our civil code, but the word is oftentimes used even by law-writers and legislators, in a different sense. The use is not so strict and uniform as to justify us in holding that the judicial sentence of a court may not sometimes be designated by a different term than judgment. The intention

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of legislators and the purpose of a statute ought not to be made to yield to one or more phrases, when the whole act evinces a different intention and purpose.

We think the code intended, that the right to file claims should terminate with the judgment and order of sale. It is true that the provision we have quoted, if taken apart from the other provisions of the same statute and given a literal construction, would require a different conclusion. It is not, however, to be so taken. We are to look, not to isolated clauses, but to the entire statute, to ascertain the legislative intention.

It is evident from a consideration of the entire statute, that the Legislature meant by the term "final adjustment" the judgment directing a recovery, and ordering a sale, of the property seized under the writ of attachment. An examination of some of the provisions of the statute will show that such a construction must be adopted, or great conflict and confusion will result. Thus, section 166 requires that the officer shall seize so much of the debtor's property as may be necessary to satisfy the plaintiff's claim, and this provision can not be made to harmonize with section 186, if construed as appellee insists it must be, for there is no authority to seize property after the judgment and sale. The right of the officer to sell is confined to the property described in the order of sale. *Harlow v. Becktle*, 1 Blackf. 237. Such property altogether might be inadequate to pay the claims upon which judgment had been recovered and those filed subsequently, but entirely sufficient to satisfy the former. The officer is authorized to sell only so much of the attached property as is necessary to satisfy the judgment and costs. *Dronillard v. Whistler*, 29 Ind. 552. If claims are allowed to be filed after the order of sale, or, as the appellee insists, before the final adjustment by distribution of the proceeds of the sale, then it will be impossible for the officer to determine how much property to sell. If he

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wrongfully sells too much, he will oppress the debtor, if too little, he will wrong the creditors. Unless the amount of recovery stated in the judgment be taken as that which shall govern, the officer will be entirely without any rule, and without anything to assist in determining what amount of property he should sell.

Again, section 192 provides that the officer shall pay all money realized from the sale of the attached property remaining after the payment of costs and expenses, "to the several creditors, in proportion to the amount of their several claims as adjusted." The words "as adjusted" plainly refer, not to a future adjustment, but to one which has been already made, and that can possibly be no other than that made by the final judgment.

There is nothing in the statute requiring or authorizing the payment of money into court for distribution; upon the contrary, section 480 plainly requires that payment shall be made directly to the attaching creditors. If the money is not to be paid into court, then there can be certainly nothing to adjust, and the judgment must, therefore, be deemed the final adjustment, for it is the only judicial order of adjustment contemplated.

Creditors are to share *pro rata* in the distribution of the proceeds of the attached property, and each creditor is therefore interested in lessening the amount of the claims of other creditors, and, as has been repeatedly decided, one creditor may defend against the claim of another. *United States Ex. Co. v. Lucas*, 36 Ind. 361; *Lytle v. Lytle*, 37 Ind. 281. This can be deemed a holding, correct only upon the theory that claims shall be determined and adjusted before the final order of sale. This must be so, or it must follow that creditors whose claims have passed into judgment must be in court at each succeeding term until all the avails of the sale of the attached property have been paid to the creditors, to protect the fund against fraudulent and illegal claims.

Price v. The State.

We deem it unnecessary to prolong this opinion by referring to other provisions of the statute, although there are others strengthening the conclusion at which we have arrived, that the right of creditors to file under an attachment terminates with the final judgment and order of sale.

Judgment reversed, at costs of appellee, with instructions to enter judgment on the special finding in favor of the appellants.

No. 9237.

PRICE v. THE STATE.

CRIMINAL LAW.—*Appeal, How and When Taken.*—*Filing Transcript.*—An appeal to the Supreme Court, in a criminal cause, is considered as taken on the day on which notice thereof is fully served on the proper officers or party, and the transcript of the record must be filed in the Supreme Court within thirty days thereafter, or the appeal will be dismissed.

From the Morgan Circuit Court.

R. L. Coffey, A. M. Cuning, J. W. Gordon, R. N. Lamb and S. M. Shepard, for appellant.

D. P. Baldwin, Attorney General, and *S. O. Pickens*, Prosecuting Attorney, for the State.

NIBLACK, J.—At the February term, 1880, of the court below, an affidavit and an information were filed against Sebastian Price, the appellant, charging him with the murder of Frederick Wiemer. A jury found him guilty as charged, fixing his punishment at imprisonment during life, and the court rendered judgment in accordance with the verdict.

On the 29th day of December, 1880, the appellant served notice of this appeal on the clerk of the Morgan Circuit Court, and on the day following, that is to say, on the 30th

The State v. Kidd.

day of December, 1880, he served a like notice on the proper prosecuting attorney. On the 5th day of February, 1881, a transcript of the proceedings below was filed in this court.

Counsel for the State have moved to dismiss this appeal, because the transcript was not filed within thirty days after the appeal was taken.

An appeal in a criminal cause is considered as taken on the day on which notice of it is fully served on the proper officers or party. *Winsett v. The State*, 54 Ind. 437; *The State v. Quick*, 73 Ind. 147. The transcript must be filed in this court within thirty days after the appeal is taken. 2 R. S. 1876, p. 411, sec. 151. It is the service of notice upon the proper officers or party, which constitutes the appeal in a criminal cause. 2 R. S. 1876, p. 411, sec. 152.

The appeal in this case must, therefore, be regarded as having been taken on the 30th day of December, 1880, the day on which the last named notice of appeal was served. The transcript not having been filed within thirty days from that day, the motion to dismiss the appeal will have to be sustained.

The appeal is dismissed, at the costs of the appellant.

74	554
150	354
150	356

No. 8588.

THE STATE v. KIDD.

CRIMINAL LAW.—*Sale of Intoxicating Liquor on Day of Municipal Election.*—*Statute Construed.*—An election, held by a city under section 1 of the act of March 25th, 1879, Acts 1879, p. 88, authorizing cities to construct water-works, is a municipal election, within the meaning of section 1 of the act of March 5th, 1877, Acts 1877, Reg. Sess., p. 92, prohibiting the sale of intoxicating liquors on the day of a municipal election.

From the Jackson Circuit Court.

The State v. Kidd.

D. P. Baldwin, Attorney General, and *F. L. Prow*, Prosecuting Attorney, for the State.

WOODS, J.—Affidavit and information against the defendant, the appellee, for an unlawful sale of intoxicating liquor, alleged to have been made in the city of Seymour, on the day of a municipal election. The defendant pleaded “not guilty,” and upon a trial by the court was acquitted and discharged.

Evidence was offered by the State for the purpose of showing a sale as charged, made in said city on the day and during the holding of an election “in said city, on the 16th day of August, 1879, for the purpose of taking a vote of the qualified voters of said city to determine whether said city would construct, maintain and operate water-works, pursuant to the act of the Legislature approved March 25th, 1879.” The evidence was objected to, on the ground that said election was not a municipal election, and that the evidence was irrelevant and immaterial. The court sustained the objection, and, by a proper bill of exceptions and assignment of error, the State has presented the question involved for our decision.

The information is based on the 1st section of the act approved March 5th, 1877, Acts 1877, Reg. Sess., p. 92, by which it is enacted, “That it shall be unlawful for any person to sell, barter, or give away, to be drunk as a beverage, any spirituous, vinous, malt, or other intoxicating liquors on Sunday, the Fourth Day of July, the first day of January, and the twenty-fifth day of December, commonly called Christmas, and thanksgiving day, as designated by proclamation of the Governor of the State, or President of the United States, or upon the day of any State, county, township, primary or municipal election in the township, town, or city where the same may be holden, and upon conviction thereof, the person so offending shall be deemed guilty of

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a misdemeanor, and be fined in any sum not less than ten, nor more than fifty dollars, to which may be added imprisonment in the county jail for any period not exceeding sixty days, in the discretion of the court or jury trying the same."

By the 1st section of the act of March 25th, 1879, Acts 1879, p. 88, it is provided, among other things, that the common council of any city, or town trustees of any incorporated town, contemplating building water-works under this act, shall, before actually embarking therein, submit the question to the qualified voters thereof, at a special or general election, and voters desiring water-works may vote, "*For water-works;*" or, if opposed, "*Against water-works.*"

* * * "That notice of such election, and submission of said question of water-works thereat shall be published for three weeks successively before the day of such election, in some newspaper printed and published in such city," etc.

We are not favored with a brief on the part of the appellee. If the court below, as seems to have been the case, concluded that an election held in a city, under the law in reference to water-works, was not a municipal election, we are not informed, and are unable to conjecture, by what process of reasoning that conclusion was reached. The power to establish water-works under the law is a power conferred on the municipality. Its exercise greatly concerned the welfare and comfort of the citizens, and an election upon the question involved questions, not only of health and convenience, but of debt and taxation. It was certainly a municipal election.

It may be noted that the law authorizing the holding of such an election was not enacted until two years after the passage of the law under which the prosecution was instituted, and on this fact it may have been held that the law defining the offence should be construed to include only such election days as were then known to the law, and that the act providing for new elections could not enlarge the scope

The State v. Smith.

of a criminal statute theretofore enacted. This argument, if admitted, proves too much. The times for holding elections have been, and doubtless will be, frequently changed, but it has not been deemed necessary on that account to change or re-enact the penal or criminal statutes which relate thereto. The general terms of these statutes are such as to preserve their force and applicability notwithstanding the changes made in other laws. The language of the law under consideration is as general and comprehensive as it could well have been made, and may as well apply to elections since provided for as to those which were authorized by the laws existing at the time of its passage, and to elections concerning water-works proposed to be erected in the municipality as to an election of municipal officers.

The appeal is sustained, at the costs of the appellee.

No. 9483.

THE STATE v. SMITH.

74	557
141	113

CRIMINAL LAW.—Assault and Battery.—Indictment.—Sufficiency of.—In a prosecution for assault and battery, an indictment charged that the defendant “did unlawfully commit an assault and battery upon the person of M. S., by then and there, in a rude, insolent and angry manner, touching, striking, beating,” etc., the said M. S.

Held, that it was insufficient for want of an averment that the touching, etc., was unlawful.

SAME.—It is not necessary to use the word “unlawful” in describing the touching, etc., if a term of the same import be employed.

From the Tipton Circuit Court.

D. P. Baldwin, Attorney General, and *J. E. Moore*, Prosecuting Attorney, for the State.

D. Waugh, for appellee.

The State v. Smith.

ELLIOTT, J.—The court below sustained a motion to quash the indictment preferred against appellee, and entered judgment in his favor, from which the State appeals.

The indictment charges that the appellee, at a time and place therein named, “did unlawfully commit an assault and battery upon the person of one Michael E. Stokes, by then and there, in a rude, insolent and angry manner, touching, striking, beating, bruising and wounding him. the said Michael E. Stokes.” The appellee insisted by his motion in the trial court, and insists by his brief here, that the indictment is insufficient, because it is not averred that the touching was unlawful. It is undoubtedly true, as appellee asserts, that an indictment for the offence of assault and battery must show that the touching was unlawful. *The State v. Murphy*, 21 Ind. 441; *Cranor v. The State*, 39 Ind. 64. An indictment which does not show this leaves out an important and essential ingredient of the offence. *Howard v. The State*, 67 Ind. 401. It has been repeatedly decided that the court cannot infer that a touching, charged to have been unlawful, was rude, insolent or angry, but that the manner of the touching must be expressly stated. *Slusser v. The State*, 71 Ind. 280; *The State v. Wright*, 52 Ind. 307. There is certainly stronger reason for holding that courts cannot infer that a rude, insolent or angry touching, was also unlawful. The presumption is in favor of innocence, and of the legality of acts, and the State must always show some fact, or facts, countervailing this presumption. It is always necessary, therefore, to show that the touching was unlawful. It is not, however, necessary that the word “unlawful” should be used. It will be sufficient if another term of the same import and meaning is employed. *The State v. Trulock*, 46 Ind. 289; *Sloan v. The State*, 42 Ind. 570; *Adell v. The State*, 34 Ind. 543; *Carder v. The State*, 17 Ind. 307; *Corneille v. The State*, 16 Ind. 232.

The State contends, that, conceding it to be necessary to

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show that the touching was unlawful, the indictment is still sufficient, because that fact is properly stated. The argument is that the word "unlawfully," as used in the clause, "did unlawfully commit an assault and battery upon the person of one Michael E. Stokes," applies to and qualifies the allegation, "by then and there, in a rude, insolent and angry manner, touching, striking and beating" the said Stokes. The appellee, upon the other hand, argues that the word "unlawfully," as used, does not apply to the specific acts of touching and striking described, but that, in order to have any such force, it should have preceded the word "touching." It is, of course, immaterial in just what place a word or allegation of the charging part of an indictment is found, provided it forms part of the description of the offence charged. An offence is properly charged by a statement of the material facts which constitute it, and not by the statement of mere conclusions of law. The phrase, "did then and there unlawfully commit an assault and battery," is a mere conclusion of the pleader, and not the averment of a material traversable fact. The word "unlawfully," as therein used, is confined in its application and meaning to the general conclusion of the pleader, that the accused did commit an assault and battery. The touching, striking and beating are not averred to have been unlawful. It is charged that the touching was rude, insolent and angry, but it is not charged that it was unlawful. The specific facts relied upon by the pleader are, that there was a touching, that it was angry and insolent, but there is no fact stated, nor allegation made, in that part of the indictment which describes the offence, from which it can be concluded as a matter of law, that the touching was not lawful. The pleader does, indeed, state generally his conclusion that the accused did unlawfully commit an assault and battery, but, in stating the facts which he alleges constituted the offence, he wholly omits to charge the essential fact of unlawfulness. If the touching was lawful, no offence

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was committed, and there is nothing in the facts stated from which it can be inferred that the touching was not entirely justifiable and lawful. The facts, as stated, do not support the pleader's conclusion that an assault and battery was unlawfully committed, and without substantive facts for its foundation, the conclusion must go for naught.

It is necessary to show that the touching was unlawful, and as the indictment fails to do this the motion to quash was properly sustained.

Judgment affirmed.

No. 7985.

DERRY ET AL. v. DERRY.

74	560
135	142
74	560
148	631
148	659
150	66
74	560
168	130
168	136

MARRIAGE.—*Valuable Consideration.*—*Contract.*—*Married Woman.*—Marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage or any valid antenuptial agreement.

TRUSTS.—*Lands Bought by Wife.*—*Husband as Trustee.*—*Purchaser for Valuable Consideration Without Notice.*—Where a wife bought land and paid for it with money of her own separate estate, and, either by agreement at the time, or without her knowledge or consent, it was conveyed to her husband, and held by him, and she made lasting and valuable improvements on it, and paid for them with her separate money, the husband held the land as trustee for her; but such trust could not defeat the title of a purchaser for a valuable consideration and without notice of the trust.

SAME.—*Second Wife.*—*Title by Descent.*—Where, in such case, the husband survives the wife, and marries again, holding such trust land, his second wife, on his death intestate, takes by descent, and not by purchase, and is bound by such trust, whether she had notice of it or not.

SAME.—*Widow.*—*Descent.*—Under our statutes, where a wife takes an interest in the lands of her deceased husband by descent, she is not within section 2 of the statute, 1 R. S. 1876, p. 915, which declares that no trust concerning lands shall defeat the title of a purchaser for a valuable consideration, without notice of the trust.

Derry *et al.* v. Derry.

SAME.—*Second Wife.*—*Survivorship.*—*Child of Marriage.*—Survivorship and a child of the marriage are required to entitle a second wife to a fee simple in the lands of her husband.

PARTITION.—*Answer.*—*Demurrer.*—In an action by a second wife for partition of land of her deceased husband, answers by the children and grandchildren of the deceased and his first wife, that she bought and paid for the land, and that her husband held it in trust for her, are sufficient on demurrer.

SAME.—*Widow's Rights.*—The law in force at the death of the husband is the measure of the widow's rights.

From the Hancock Circuit Court.

J. L. Mason and *J. H. Mellett*, for appellants.

W. R. Hough and *G. Barnett*, for appellee.

BICKNELL, C.—This was a suit by the appellee for partition. The complaint avers that Jeremiah Derry died intestate, seized of the land in controversy, leaving, him surviving, his widow, the appellee, their child Emma J. Derry, several children by a former marriage, and several grandchildren. These children by the former marriage and these grandchildren are the appellants.

The complaint states that the appellee, as such widow, is the owner in fee of one undivided third part of said land, and that the other two thirds are owned in fee by the appellants in certain specified shares.

The appellants filed an answer in three paragraphs, of which the first, being the general denial, was subsequently withdrawn.

The second paragraph states that the appellants are the children and grandchildren of said Jeremiah Derry and his wife, Malinda Derry, deceased; that she, in her lifetime, requested her husband to buy for her the land in controversy, and gave him money of her own separate estate to pay for it; that he bought the land and paid said money for it, but, without her knowledge or consent, had the deed for it made to himself.

The third paragraph of the answer states that the appel-

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lants are the children and grandchildren of Malinda Derry, who died in 1867, and that in 1853 she bought the land in controversy, and paid for it with money of her own separate estate, and that, by agreement made at the time of the purchase between her and her husband, the said Jeremiah Derry, in good faith and without any fraudulent intent, said land was conveyed to said Jeremiah, and was to be held by him in trust for said Malinda; that said land was so held in trust by said Jeremiah, and that said Malinda in her lifetime made lasting and valuable improvements on said land, and paid for them with her own separate money.

The appellee demurred to each of these paragraphs, for want of sufficient facts, etc.; the demurrers were sustained by the court. The appellants declined to answer further, and the result was a judgment in partition, awarding one-third of the land to the appellee in fee simple. From this judgment the appeal was taken. Several errors are assigned, but we are required to consider those only which are alluded to and discussed in the appellants' brief, namely:

First. The court erred in sustaining the demurrer to the second paragraph of the answer;

Second. The court erred in sustaining the demurrer to the third paragraph of the answer.

The facts stated in the second paragraph of the answer, and the facts stated in the complaint and not denied in said paragraph, are these: The appellants are the children and grandchildren of Jeremiah Derry and his wife, Malinda Derry. The latter died in 1867. In her lifetime, at her request, her said husband bought for her the land in controversy, and paid for it with money of her separate estate; but, without her consent or knowledge, he had the deed for the land made to himself. Jeremiah Derry died seized of the land; the appellee was his widow, and had been his second wife; they had one child, Emma J. Derry, who survived her father, and was one of the defendants in the court below.

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Upon these facts Jeremiah Derry held the land as trustee for Malinda Derry. 1 R. S. 1876, chap. 276, p. 915, secs. 6, 8; *Tracy v. Kelley*, 52 Ind. 535. But such trust could not defeat the title of a purchaser for a valuable consideration and without notice of the trust. 1 R. S. 1876, chap. 276, p. 915, sec. 2; *Hampson v. Fall*, 64 Ind. 382; *Catherwood v. Watson*, 65 Ind. 576.

The appellee claims that she was a purchaser for a valuable consideration, and that the second paragraph of the answer is bad, because it does not aver that she had notice of the trust.

Marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage, or by virtue of any valid antenuptial agreement. *Magniac v. Thompson*, 7 Pet. 348; 4 Kent Com. 463, and cases there cited. But the appellee in this case acquired by the marriage no complete right of property in the land in controversy; to entitle her to a fee simple in the land in controversy required survivorship by her and a child of the marriage. 1 R. S. 1876, chap. 98, p. 408, secs. 17, 24. The law in force at the death of the husband is the measure of the widow's rights. *Bowen v. Preston*, 48 Ind. 367.

The appellee in this case, her husband having died seized of the land, if she takes any interest in it, takes it under section 17 above cited, and she takes by descent and not by purchase. Upon this point the language of WORDEN, J., giving the opinion of the court in *May v. Fletcher*, 40 Ind. 575, is as follows: "Sections seventeen, twenty-three, and twenty-five of the statute of descents, * * are explicit that the land, as therein provided for, 'shall descend to her.' They provide for the disposition of lands only of which the ancestor shall die seized, * * and which must go by descent to some heirs, in the absence of any testamentary disposition. The Legislature have the power to make a surviving wife, as well

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as a child, an heir." It was said by BUSKIRK, J., giving the opinion of the court in *Bowen v. Preston*, 48 Ind. 367: "The widow takes as the heir of her husband, when the husband dies seized of the lands. The widow takes by virtue of her marital rights, under sec. 27, when the husband was seized in fee during the marriage, and died disseized, and she did not join in the conveyance." It has been said that "A widow is an heir of her deceased husband only in a special and limited sense." *Unfried v. Heberer*, 63 Ind. 67. But, if she is heir in any sense under section 17, she does not take by purchase. It follows that the second paragraph of the answer was a good defence under sections 6 and 8 of chapter 276, 1 R. S. 1876, p. 915, and that the provision in section 2 of the same chapter, upon which the counsel for the appellee rely, does not embrace the case of a widow who claims one-third in fee, under sections 17 and 24 of the statute of descents above cited. It follows, also, that the third paragraph of the answer contained a sufficient defence to the complaint, under the last clause of section 8 of chapter 276, 1 R. S. 1876, p. 916, which in connection with section 6 of the same chapter provides that when land is bought and paid for by one person and the deed is made to another, and it is made to appear that, by agreement and without any fraudulent intent, the latter was to hold the land in trust for the former, then such trust shall be recognized and enforced. *McDonald v. McDonald*, 24 Ind. 68; *Glidewell v. Spaugh*, 26 Ind. 319; *McCollister v. Willey*, 52 Ind. 382. The provision in section 2 of chapter 276, 1 R. S. 1876, p. 915, is not applicable to this third defence, because, as already stated, the appellee was not a purchaser for a valuable consideration, but was claiming by descent, and not by purchase, under sections 17 and 24 of the statute of descents above cited.

The court below erred in sustaining the demurrer to the second and third paragraphs of the answer. Its judgment ought to be reversed, and the cause remanded, with instruc-

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tions to the court below to overrule the demurrers to the second and third paragraphs of the answer, and for further proceedings.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellants, and this cause is remanded with instructions to the court below to overrule the demurrers to the second and third paragraphs of the answer, and for further proceedings.

ON PETITION FOR A REHEARING.

BICKNELL, C.—Under the statutes of Indiana, the interest of a wife in the lands of her deceased husband is in some cases held by purchase, and in other cases by descent.

Where she takes by descent, she is not within the statute, which declares that no trust shall defeat the title of a purchaser for a valuable consideration, without notice. In the present case the second wife could take by descent only; she was, therefore, bound by the trust in favor of the first wife, whether she had notice of it or not. The question is between the second wife and the representatives of a first wife. “In equal equities the law must prevail.” The petition for a rehearing ought to be overruled.

PER CURIAM.—Petition overruled.

No. 7096.

VERT v. VOSS ET AL.

PRACTICE.—*Harmless Error.*—*Answer.*—*Demurrer.*—The overruling of a demurrer to a bad answer to an insufficient complaint is not such error as will justify or authorize a reversal of the judgment.

SAME.—*Insufficient Answer to Insufficient Complaint.*—A bad answer is a sufficient answer to an insufficient complaint, and such complaint will not support a judgment thereon.

74	565
125	246
74	565
128	54
74	565
137	47
74	565
147	406
74	565
150	475

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REPLEVIN BAIL.—Subrogation.—Principal and Surety.—The rule, that where a surety, such as replevin bail, has been compelled to pay the debt of his principal, for which the creditor holds other security, such surety will be subrogated to the creditor's rights in such other security for his reimbursement, is applicable only where the surety or replevin bail has paid the whole debt covered by the security held by the creditor, or where it appears that the residue of the debt, not paid by such surety or bail, has been otherwise fully paid.

SAME.—Judgment.—Mortgage.—Payment.—Where the judgment on which a replevin bail was liable had been rendered on one of several promissory notes, all of which were secured by mortgage on real estate, and some of which were not due at the rendition of the judgment, the payment of such judgment by the replevin bail would not entitle him to be subrogated to the rights of the judgment creditor.

From the Hamilton Circuit Court.

D. Moss and R. S. Losey, for appellant.

G. H. Voss, for appellees.

Howk, J.—This was a suit by the appellant against the appellees, in a complaint of a single paragraph, wherein he alleged, in substance, that on the 13th day of January, 1874, the appellees, Oliver P. Rooker and America Rooker, purchased of their co-appellee, Peter Cloud, three parcels of real estate, particularly described, in Hamilton county, Indiana; that, on the same day, the said Peter Cloud conveyed the said real estate to said Oliver P. and America Rooker, then husband and wife, as joint tenants; that, for a part of the purchase-money of said real estate, the said Oliver P. Rooker executed to said Peter Cloud his five promissory notes, all dated January 7th, 1873, for the sum of \$1,500.00 each, and payable respectively in one, two, three, four and five years after date, with six per cent. interest from date, and waiving valuation laws; that afterward, on January 17th, 1874, said Oliver P. and America Rooker executed to said Cloud a mortgage on all said real estate to secure the payment of said notes; that afterward, on the 5th day of March, 1875, the said Peter Cloud, by the consideration of the Hamilton Circuit Court, recovered a judgment against

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said Oliver P. Rooker, on the second of the said notes, for the sum of \$1,694.25, and costs of suit, upon which said judgment the appellant, on the 24th day of March, 1875, became replevin bail in due form of law; that afterward, on September 8th, 1875, the said Oliver P. and America Rooker bargained and sold to one Samuel P. Rooker a certain portion, particularly described, of the mortgaged real estate, which said portion was of the value of \$2,000.00, and that the said Peter Cloud, on September 9th, 1875, at the request of the said Rookers, and without the appellant's knowledge or consent, released the said portion of said real estate from the lien of said mortgage, and thereby defrauded the appellant of the right and privilege of paying off said judgment, as such replevin bail, and being subrogated to all the rights of said Cloud in said mortgage and in the foreclosure thereof; by means whereof the appellant became and was released from all liability as replevin bail for said Oliver P. Rooker.

And the appellant further said that the said Cloud afterward sued the said Oliver P. and America Rooker on the last three notes secured by said mortgage, in said court, and by the consideration thereof, at its February term, 1876, recovered judgment for the sums due and to become due, and for the foreclosure of said mortgage; that, since said judgment, the said Cloud had caused the said real estate to be sold under said foreclosure by the sheriff of said county, and bid the same in for the sum of \$1,371.55; that afterward, on the 4th day of September, 1876, the said Cloud assigned his certificate of purchase under said foreclosure sale and his said judgments, to the appellee Voss, who purchased the same with full knowledge of all the aforesaid facts; that the said Oliver P. Rooker and wife were wholly and notoriously insolvent, and had no property out of which the judgment, on which the appellant became replevin bail, could be satisfied in whole or in part.

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Wherefore the appellant asked that, by the judgment of the court, he might be released from all liability as replevin bail, on the first described judgment, and for other proper relief.

The appellee Voss separately answered in three special paragraphs, to each of which the appellant's demurrer, for the want of facts, was overruled by the court, and to each of these rulings he excepted. The cause having been put at issue, the trial thereof by a jury resulted in a general verdict for the appellees, the defendants below.

The appellant's motion "for a judgment in his favor, on his complaint herein, notwithstanding the verdict of the jury," was overruled by the court, and his exception was duly entered to this decision; and, over his motion for a new trial and exception saved, judgment was rendered against him on the general verdict for the appellees' costs.

In this court the appellant assigned as errors the following decisions of the circuit court:

1. In overruling his demurrers to the first, second and third paragraphs of the separate answer of the appellee Voss;
2. In overruling his motion for a judgment in his favor, on his complaint, *non obstante veredicto*; and,
3. In overruling his motion for a new trial.

The second alleged error, namely, the overruling of the appellant's motion for a judgment in his favor, on his complaint, notwithstanding the verdict of the jury, is the one chiefly relied upon by the appellant's counsel, in argument, for the reversal of the judgment. Counsel say: "It is insisted that, in overruling this motion, the court below committed an error, for which the judgment in this case should be reversed, with instructions to sustain the motion. * * * * The sufficiency of the complaint was not questioned by demurrer. It is evidently sufficient. The mortgagee consented to the conveyance of the 28½ acres, and released his mortgage."

On the other hand, the appellee's counsel claims that the facts stated in the appellant's complaint were not sufficient

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to constitute a cause of action in his favor, and that, for this reason, the court committed no available error, either in overruling his demurrers to the several paragraphs of answer, or in overruling his motion for a judgment in his favor, on his complaint, *non obstante veredicto*. If the complaint did not state a cause of action, it is certain that the court did not err in overruling the appellant's motion for a judgment thereon, and it is equally certain, as it seems to us, that, in overruling a demurrer to a bad answer to an insufficient complaint, no such error would be committed as would justify or authorize a reversal of the judgment. A bad answer is a sufficient answer to an insufficient complaint, and such a complaint will not support a judgment thereon.

The appellant's cause of action, as stated in his complaint, in the case at bar, was founded upon his alleged right of subrogation, by paying off the judgment on which he was replevin bail, to all the rights of the judgment plaintiff, Peter Cloud, in the mortgage described in said complaint. It is manifest that if, under the law, the appellant could not acquire such right of subrogation by paying off said judgment, his supposed cause of action would be wholly unfounded and would not sustain the judgment sought for. Ordinarily, the rule seems to be well settled, as well by the decisions of this court as by those of the courts of last resort in most of the States of the Union, that where a surety, such as replevin-bail, has been compelled to pay the debt of his principal, for which the creditor holds other security, such surety will at once, by such payment, be subrogated to the creditor's rights in such other security, for his reimbursement. *Gerber v. Sharp*, 72 Ind. 553, and authorities cited. But this rule is applicable only where the surety, or replevin bail, has paid the whole debt covered by the security held by the creditor, or where it appears that the residue of the debt, not paid by such surety or bail, has been otherwise fully paid.

In the case now before us, it will be seen from the com-

Vert v. Voss *et al.*

plaint, a summary of which we have heretofore given, that the judgment, on which the appellant had become liable as replevin bail, was rendered on one of five promissory notes, all of which were covered and secured by the same mortgage on real estate, and three of which were not yet due, at the time of the rendition of said judgment. In such a case, it is certain that the payment of the judgment by the appellant, as such replevin bail, would not entitle him to be subrogated to the rights of the judgment creditor in the mortgage security; and in his complaint he asserted no other claim to such subrogation, except such as would arise from his payment of said judgment. *Zook v. Clemmer*, 44 Ind. 15, and cases there cited.

We are of the opinion that the facts stated in the complaint were wholly insufficient to show that the appellant was entitled to be subrogated to the rights of the judgment creditor in the mortgage security, or that he was in any manner damaged by the alleged release of a part of the mortgaged premises from the lien of the mortgage. His complaint did not state a cause of action, in his behalf, against the appellees or either of them, and, therefore, the court committed no available error in overruling his demurrers to appellees' answers, or his motion for a judgment in his favor, on his complaint, *non obstante veredicto*.

In their argument of this cause, in this court, the appellant's counsel have not even alluded to the alleged error of the trial court, in overruling the motion for a new trial. This supposed error must therefore, under the settled practice of this court be regarded as waived.

The judgment is affirmed, at the appellant's costs.

Stack v. Beach.

No. 7660.

STACK v. BEACH.

74	571
126	458
74	571
134	14

BILL OF EXCHANGE.—Promissory Note.—Contract of Endorsement.—Parol Evidence not Admissible to Contradict or Vary.—Presumption.—An endorsement of a promissory note or bill of exchange, regularly following that of the payee, constitutes a certain and defined contract, with a legal force and meaning as complete and certain as if all the conditions and stipulations of the contract had been written out at full length, and parol evidence is inadmissible to modify or contradict such a contract of endorsement; but the endorsement of a note or bill not previously endorsed, or not endorsed at all by the payee, is an irregular proceeding, and the contract created by it is not one of fixed and definite legal import.

SAME.—Exceptions to Rule as to Admission of Parol Evidence.—While it is the general rule that a contract of endorsement regularly following that of the payee can not be varied or contradicted by parol evidence, yet such evidence is admissible to show that the endorsement was for the purpose of creating a trust; that it was for collection merely; that the instrument was endorsed as collateral security, or delivered as an escrow, or endorsed to an agent for a particular purpose.

PLEADING.—Must State Facts.—A bare general statement, thrown into the body of a pleading setting forth specific facts, can not control the pleading and make good what would otherwise be insufficient; the substantive traversable facts are to be looked to in determining its sufficiency, and not mere conclusions.

From the Vigo Circuit Court.

A. B. Carlton and J. E. Lamb, for appellant.

J. G. Williams and B. V. Marshall, for appellee.

ELLIOTT, J. —Appellant was sued as the endorser of a bill of exchange. The answer is in two paragraphs. This appeal presents the question of the sufficiency of the second of these paragraphs, to which the trial court sustained a demurrer.

The material statements of the answer are, in substance, these: That appellant went with one John W. Wilson, to the Prairie City Bank, of Terre Haute, for the purpose of identifying the said Wilson as the payee and holder of the bill of exchange sued on; that the agent of the bank requested appellant to write his name on the back thereof, for the

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purpose of identifying Wilson ; that he, the appellant, never owned or had possession of said bill ; that he did not negotiate it ; that he did not sign it as maker, surety or endorser ; that the sole purpose for which he wrote his name on the back thereof was to identify the said Wilson as the payee of said bill ; that Wilson was the identical person he represented himself to be ; that appellant was not requested to write his name as endorser by Wilson or anybody else ; that he was not informed, nor did he understand, that he was signing as an endorser.

The answer is insufficient. The contract of indorsement was a written one, and fully within the rule that parol evidence is not admissible for the purpose of modifying or contradicting written contracts. In *Prescott Bank v. Caverly*, 7 Gray, 217, evidence was offered to show that the indorser had only placed his name upon the back of the bill to identify the person to whom it was paid, and that it was agreed and understood that this was the sole purpose for which the signature was placed upon the note, but the evidence was excluded. There are in our own reports many cases holding that parol evidence is not admissible for the purpose of showing that an endorsement was without recourse. *Lee v. Pile*, 37 Ind. 107 ; *Campbell v. Robbins*, 29 Ind. 271 ; *Wilson v. Black*, 6 Blackf. 509 ; *Blair v. Williams*, 7 Blackf. 132. In *Parker v. Morton*, 29 Ind. 89, it was held that an answer to an action upon the assignment of a promissory note, setting up a verbal contemporaneous agreement, was insufficient. There is some conflict in the decisions of other courts, but the weight of authority is with the holding of our court, that the endorsement is a written contract, and within the rules of evidence ordinarily applicable to such contracts. The cases which hold the contrary doctrine proceed upon the theory that the contract is implied by law, and is not set out in writing, but this doctrine can not be reconciled with fundamental principles. The reason upon which rests the rule

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sanctioned by this and many other courts is thus well and accurately stated in *Woodward v. Foster*, 18 Grat. 200: "When the legal import of a contract is clear and definite, the intention of the parties is, for all substantial purposes, as distinctly and as fully expressed, as if they had written out in words what the law implies. It is immaterial how much or how little is expressed in words, if the law attaches to what is expressed a clear and definite import. Though the writing consists only of a signature, as in the case of an indorsement in blank, yet where the law attaches to it a clear, unequivocal and definite import, the contract imported by it can no more be varied or contradicted by evidence of a contemporaneous parol agreement, than if the whole contract had been fully written out in words. The mischiefs of admitting parol evidence would be the same, in such cases, as if the terms implied by law had been expressed."

There is an important exception to the general rule, that an endorsement can not be varied or contradicted by parol evidence. Parol evidence is admissible for the purpose of showing that the endorsement created a trust. Thus it may be shown that a principal endorsed to an agent for the purpose of allowing the latter to use the bill for some particular purpose. *Dale v. Gear*, 38 Conn. 15; *Chaddock v. Vanness*, 35 N. J. L. 517. So it has been held that the endorsement may be shown to have been for collection merely, and that the instrument was delivered as an escrow upon an express condition not performed. *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kan. 412; *Wallis v. Littell*, 11 C. B. N. s. 369; *Bell v. Lord Ingestre*, 12 Q. B. 317. It is upon this general doctrine that the holding in *Hazzard v. Duke*, 64 Ind. 220, that it may be shown by parol evidence that the instrument was endorsed as collateral security, can be fully sustained. The principle that parol evidence is competent for the purpose of showing a trust is by no means confined to contracts of endorsements. Whart. Evidence, sec.

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903. A familiar illustration of this general doctrine is supplied by the numerous cases holding that a deed absolute on its face may be shown to be a mortgage. The cases which hold that, as between the parties who execute or endorse the bill, the true relationship may be shown, do not trench upon the rule that an endorsement can not be varied by parole evidence. The rights of such parties may be tried between themselves, but the rights of the holders can not be thereby affected. *Houston v. Bruner*, 39 Ind. 376. Nor do those cases which hold that where the endorsement is made by a third person, prior to an endorsement by the payee, parole evidence is admissible to show the character of the indorser's undertaking, have any bearing upon the question here under discussion. The contract, in such a case, is unlike that of a full contract created by writing the name after the payee has regularly endorsed the instrument. The endorsement of a note or bill, not previously endorsed or not endorsed at all by the payee, is an irregular proceeding, and the contract created by it is not one of fixed and definite legal import. An endorsement regularly following that of the payee does constitute a certain and defined contract, with a legal force and meaning quite as complete and certain as if all the conditions and stipulations of the contract had been written out at full length. This is substantially the doctrine declared in *Vore v. Hurst*, 13 Ind. 551, and which has been sanctioned by a long and unbroken line of decisions. *Armstrong v. Harshman*, 61 Ind. 52; *Holton v. McCormick*, 45 Ind. 411; *Roberts v. Masters*, 40 Ind. 461; *Drake v. Markle*, 21 Ind. 433; *Dale v. Moffitt*, 22 Ind. 113; *McGaughey v. Elliott*, 18 Ind. 121. There are many adjudicated cases declaring and enforcing the principle upon which our cases are bottomed. Among them are *Brown v. Spofford*, 95 U. S. 474; *Specht v. Howard*, 16 Wal. 564; *Howe v. Merrill*, 5 Cush. 80; *Bigelow v. Colton*, 13 Gray, 309; *Wright v. Morse*, 9

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Gray, 337 ; Crocker v. Getchell, 23 Me. 392 ; Tankersley v. Graham, 8 Ala. 247.

It affirmatively appears, from the complaint and answer, that the appellant's endorsement follows that of the payee, and the case is therefore brought fully within the rule which has so long prevailed in this State.

The answer contains a general statement that the appellant did not endorse the note, but this is a mere conclusion of the pleader from the facts stated, and does not of itself make the answer sufficient. A bare general statement, thrown into the body of a pleading setting forth specific facts, will not be allowed to control the pleading, and make good what would otherwise have been bad. The substantive traversable facts are to be looked to in determining the sufficiency of a pleading, and not mere conclusions. *Neidefer v. Chastain*, 71 Ind. 363. It would violate all rules of good pleading to permit a pleader to make good a pleading, by casting into it, in some out of the way place, a general statement, entirely variant from, and inconsistent with, the facts stated as constituting the cause of action or defence.

Judgment affirmed.

No. 6831.

SMITH ET AL. v. KYLER ET AL.

PRACTICE.—*Motion to Suppress Depositions.—How Made Part of Record.*—

A motion to suppress depositions and the ruling of the court thereon must be made a part of the record by bill of exceptions or order of court, to properly constitute a part of the record on appeal.

SAME.—*Pleading Struck Out.—How Made Part of Record.*—Where a pleading, or any part thereof, has been struck out or rejected, it will not thereafter constitute a part of the record on appeal, unless made so by bill of exceptions or order of court.

74	575
129	348

74	575
138	509

74	575
167	168

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SAME.—*New Trial.*—*Assignment of Causes.*—*Supreme Court.*—Where matters constituting proper causes for a new trial are not assigned as such in a motion therefor, their assignment as error on appeal presents no question for the decision of the Supreme Court.

SAME.—*Assignment of Error.*—*Verdict.*—An assignment of error, that the court erred in rendering judgment on the verdict, does not question the correctness of the verdict, and presents no question for the decision of the Supreme Court.

SAME.—*Judgment.*—*Objections to Form.*—Objections to the form or substance of a judgment can not be presented for the first time in the Supreme Court.

REAL ESTATE, ACTION TO RECOVER.—*Pleading.*—*Complaint.*—The omission of the word “unlawfully,” in a complaint for the recovery of real estate, does not render it bad on demurrer thereto for want of facts, if its equivalent in meaning is used therein; and the allegations, that the plaintiffs were entitled to the possession of the real estate, and that the defendants kept them out of it, *without right*, are sufficient.

SAME.—*Mistake in Title Papers Corrected.*—*Quieting Title.*—*Pleading.*—*Practice.*—*Motion to Strike Out.*—*Demurrer.*—In an action to recover the possession of real estate and to quiet title thereto, the plaintiff may, as an incident to such action, under section 71 of the code, 2 R. S. 1876, p. 70, have a mistake in his title papers corrected in such suit, and if the complaint states a good cause of action for the recovery of the real estate and for quieting title thereto, a demurrer will not lie, even though the allegations thereof in regard to the alleged mistake in the deed were defective and insufficient; an objection to the complaint for such cause can be reached either by a motion to strike out or to make more specific the allegations in regard to the alleged mistake.

PRACTICE.—*Instructions.*—*When not Part of Record.*—*Motion for New Trial.*—*Supreme Court.*—Instructions, whether given or refused, can not be made a part of the record by setting them out or copying them in the motion for a new trial, as a cause therefor. A recital in the motion for a new trial, that instructions asked for had been refused by the court, can not be taken as true by the Supreme Court, unless the truth thereof be properly shown by the record.

SAME.—*Instructions Refused.*—*Presumption.*—*Record.*—Where the instructions of the court, given upon its own motion, are not made a part of the record, and are not found in the transcript, the Supreme Court will presume that other instructions asked for were properly refused by the trial court.

SUPREME COURT.—*Objection to Evidence.*—*Practice.*—Where the record fails to show the ground of objection to the admission of evidence, the Supreme Court will not consider the question of the admissibility of the evidence, nor the objections made thereto in the Supreme Court.

Smith *et al.* v. Kyler *et al.*

TAXES.—Evidence.—Tax Deed.—Personalty Should be First Exhausted.—
Testimony of Auditor of County.—Where a tax deed fails to show that the personal property of the delinquent had been exhausted before the sale of his real estate, or that he had no such property, such deed is not admissible as evidence of title until such facts are shown *aliunde*; and the testimony of the auditor of the county where such real estate is situate, “that the records in his office showed that there was no personal property assessed” to the delinquent in but one of two years in which the taxes on the real estate became delinquent, is insufficient to prove the facts necessary to entitle the deed to be admitted in evidence.

From the Boone Circuit Court.

C. S. Wesner, T. J. Cason and J. L. Pierce, for appellants.

R. W. Harrison, R. P. Davidson and J. C. Davidson, for appellees.

Howk, C. J.—This was a suit by the appellees against the appellants to recover the possession of, and quiet the title to, certain real estate, particularly described, in Boone county, Indiana. The cause was first tried by the court, resulting in a finding and judgment for the appellees. On the appellants’ application, this judgment was vacated and a new trial was granted them as of right, under the statute.

The issues joined were then tried by a jury, and a verdict was returned for the appellees, that they were the owners and entitled to the possession of the lands, described in their complaint; and further, “that, in the deed of conveyance from William H. Lee and Mary Ann Lee to Russell Hazeltine, dated September 1st, 1853, and described in plaintiffs’ complaint, the said southwest quarter of the northwest quarter of section, township and range aforesaid, was by mutual mistake described as the southeast quarter of the northwest quarter of said section, township and range; and said mistake in equity ought to be corrected.” The appellants’ motion for a new trial for cause having been overruled, and their exception saved to this ruling, the court rendered judgment on the verdict for the appellees, as prayed for in their complaint.

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In this court, the appellants have assigned the following decisions of the circuit court as errors :

1. In overruling their motion to suppress the appellees' depositions.
2. In overruling their demurrer to appellees' complaint.
3. In sustaining appellees' motion to strike out the second paragraph of their joint answer.
4. In sustaining appellees' motion to strike out the separate answer of William S. Smith and Sarah J. Tipton.
5. In its finding that appellees were the owners and entitled to the possession of the premises in controversy, and that there was a mistake in the deed from William H. and Mary A. Lee to Russell Hazeltine.
6. In rendering judgment for the appellees for the possession of the real estate in controversy.
7. In making a qualified vacation of the first judgment, in granting a new trial of the cause.
8. In overruling the appellants' motion to set aside a part of the order vacating the first judgment.
9. In overruling their motion for a new trial.
10. In refusing to give the jury certain instructions asked for by the appellants.
11. In rendering judgment on the verdict.
12. In admitting in evidence the deed from William H. and Mary A. Lee to Russell Hazeltine.
13. In sustaining the appellees' objections to the introduction in evidence by the appellants of a tax deed from the auditor of Boone county to David A. Caldwell.

Of these alleged errors, the first, third and fourth were not properly saved by the appellants, and are not apparent in the record. The motion to suppress the appellees' depositions, and the ruling of the court thereon, were not made a part of the record, either by a bill of exceptions or by an order of the court. Section 559 of the code provides that a transcript of motions, etc., which "relate to collateral

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matters, and depositions," shall not be deemed parts of the record nor certified as such, unless such motions and other papers are made parts of the record by bills of exceptions or orders of the court. 2 R. S. 1876, p. 242. So, also, with regard to the answers of the appellants, which had been struck out on motion, the errors assigned on these rulings are not shown by the record; for the answers so struck out were not made parts of the record, in either of the modes prescribed by law. When any pleading, or any part thereof has been struck out or rejected, such pleading or part thereof will not thereafter constitute a part of the record, unless it has been made such part thereof either by a bill of exceptions or by an order of the court. *Stott v. Smith*, 70 Ind. 298.

The fifth alleged error is simply a prolix statement of the assumed fact, that the finding of the court was not sustained by sufficient evidence. The fifth, tenth, twelfth and thirteenth errors stated matters which would have constituted proper causes for a new trial, in a motion therefor addressed to the trial court; but these matters were improperly assigned as independent errors, in this court. If these matters were assigned by the appellants as causes for a new trial, in their motion therefor, then the only proper assignment of error, in relation thereto, was, that the court had erred in overruling the motion for a new trial; for this assignment of error would bring before this court all the causes properly assigned in the motion for a new trial. But, if these matters were not assigned by the appellants, as causes for a new trial, in their motion therefor, then it is certain that their assignment here, as supposed errors, would present no question for the decision of this court; for it is well settled that this court will not consider any matter constituting a proper cause for a new trial, when it affirmatively appears that the attention of the trial court had not been directed thereto, in the motion for such new trial. *Freeze v.*

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De Puy, 57 Ind. 188 ; *Walls v. The Anderson, etc., R. R. Co.*, 60 Ind. 56 ; *Lamphier v. The State*, 70 Ind. 317.

The sixth and eleventh alleged errors are that the court erred in rendering judgment for the appellees on the verdict. These supposed errors present no question for the decision of this court. They do not question the correctness of the verdict, and the judgment follows the verdict. If the verdict is right, so also is the judgment. Besides, the appellants did not object or except below either to the form or substance of the judgment, nor did they there move for its modification in any particular. Such objections to a judgment can not be presented in this court for the first time. *Smith v. Tatman*, 71 Ind. 171.

The seventh and eighth alleged errors relate exclusively to the first judgment in this cause. The record shows that after these errors were committed as alleged, and before the second trial of the case, the circuit court, of its own motion, corrected such errors and vacated its first judgment, without any qualification whatever. This the court had the right to do, and after it was done the errors in question were no longer available for the reversal of the judgment.

The second error assigned by the appellants is the decision of the circuit court in overruling their demurrer to the appellees' complaint. In their complaint the appellees, as the heirs at law and administrator of the estate of Russell Hazeltine, deceased, alleged, in substance, that they were the owners in fee simple, and entitled to the possession, of the real estate in Boone county, described as the southwest quarter of the northwest quarter, and the northwest quarter of the southwest quarter, of section 17, in township 19 north, of range 2 east, containing eighty acres more or less ; that the appellees were entitled to the possession of said lands, and the appellants kept them out of the possession thereof, without right ; that one William Lee and the appellant, Mary Ann Lee, conveyed the said lands to one Russell Ha-

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zeltine by deed, a copy of which was therewith filed; that, by a mistake in said deed, the said southwest quarter of the northwest quarter of said section 17 was described therein as the southeast quarter of the northwest quarter of said section; that the said William H. Lee and Russell Hazeltine had each since died—the said Lee leaving all the appellants, except the said William S. Smith and Sarah J. and John G. Tipton, as his heirs at law, and the said Hazeltine leaving all the appellees, except said Patrick H. Cone, administrator, as his heirs at law. Wherefore, etc.

Two objections are urged by the appellants' counsel to the sufficiency of this complaint, each of which we will briefly consider. It is claimed that the complaint was bad on the demurrer thereto, because it was not alleged therein that the appellants *unlawfully* kept the appellees out of the possession of the lands in controversy. It is true that the word "unlawfully" is not to be found in the appellees' complaint, and it is true, also, that section 595 of the code provides that "The plaintiff in his complaint shall state," *inter alia*, "that the defendant unlawfully keeps him out of possession." 2 R. S. 1876, p. 251. But we can not regard the word "unlawfully" as in any sense a technical term, and if, as in this case, its equivalent in meaning has been used, the complaint can not be held bad, because of the omission therefrom of the word in question. It will be seen from our summary of the complaint, that the appellees alleged therein that they were the owners in fee simple, and entitled to the possession, of the real estate in suit, and that the appellants kept them out of the possession thereof, without right. The allegations, that the appellees were entitled to the possession of the real estate, and that the appellants kept them out of the possession thereof *without right*, were certainly tantamount to a positive averment that they unlawfully kept the appellees out of possession. Section 592 of the code provides that "Any person having a valid subsisting interest in

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real property, and a right to possession thereof, may recover the same by action," etc. 2 R. S. 1876, p. 250. The appellees asserted in their complaint "a valid subsisting interest in real property, and a right to possession thereof," and, if the evidence were sufficient, it would seem that they might recover the same, under the statute, in this action. However this may be, we are of the opinion that the omission of the word "unlawfully" from the appellees' complaint did not vitiate it or render it bad, on the demurrer thereto for the want of facts.

The other objection to the sufficiency of the complaint, upon which the appellants' counsel seem to rely for a reversal of the judgment, is that the averments in regard to the alleged mistake in the deed, which the appellees sought to have corrected, were not sufficient to entitle them to such relief. If the gist of the appellees' action had been the correction of the alleged mistake in the deed from William H. and Mary A. Lee to Russell Hazeltine, it would seem to us that the complaint had failed to state a cause of action against the appellants, in this, that it did not allege a mutual mistake of fact in such deed, by all the parties thereto, and that, for the want of such an allegation, the complaint would have been bad, and the demurrer thereto ought to have been sustained. *Nicholson v. Caress*, 59 Ind. 39; *Easter v. Severin*, 64 Ind. 375; *Schoonover v. Dougherty*, 65 Ind. 463; *Dowell v. Caffron*, 68 Ind. 196. But in section 71 of the code it is provided, among other things, that when the plaintiff desires to correct any mistakes in "title papers, or other instruments of writing," he may bring a separate action therefor, or he may have such "mistakes corrected, in any other action, when such * * * correction would be essential to a complete remedy." 2 R. S. 1876, p. 70.

In the case at bar, the appellees' complaint, a summary of which we have given, shows very clearly that the gravamen of this action was the recovery of the possession of the

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real estate, and the determination and quieting of the appellees' title thereto; and as an incident to this cause of action, "essential to a complete remedy," they sought to have the alleged mistake in one of their title papers corrected in the same suit. This the appellees had the right to do, under the statutory provisions last quoted; and as the complaint stated facts sufficient to constitute a cause of action in their behalf, for the recovery of the real estate, and for the quieting of their title thereto, it is certain that the court committed no error in overruling the demurrer to their complaint, even though its allegations in regard to the alleged mistake in the deed were clearly defective and insufficient. The appellants' objection to the complaint now under consideration could only have been reached and made available, as it seems to us, either by a motion to strike out or reject the allegations in regard to the alleged mistake in the deed, on the ground of their insufficiency, or by a motion to make such allegations more certain and specific.

Our conclusion is that the appellees' complaint stated facts sufficient to constitute a cause of action in their behalf, and that the appellants' demurrer thereto was correctly overruled.

The only other alleged error remaining to be considered is the ninth, namely, the decision of the circuit court in overruling the appellants' motion for a new trial. In their motion, the following causes for such new trial were assigned by the appellants:

1. Because the verdict of the jury was not sustained by sufficient evidence, and was contrary to law;

2. Because of error of law, occurring at the trial and excepted to, in this, in excluding from the jury, when offered in evidence, the tax-title deed executed by Joseph B. Pitzer, auditor of Boone county, on December 6th, 1862, to David A. Caldwell, of the real estate in controversy;

3. Because of error of law, occurring at the trial and excepted to, in this, in admitting in evidence, over appellants'

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objections, the deed of said real estate executed to Russell Hazeltine by William H. and Mary A. Lee, on September 1st, 1853, but not recorded nor filed for record, in the recorder's office of Boone county, until June 19th, 1868, and of which deed the appellants had no earlier notice; and,

4. Because the court erred in refusing to give the jury trying the cause the instructions asked for by the appellants, and numbered from two to eleven inclusive.

We will consider and decide the several questions presented by or arising under these alleged causes for a new trial, in the inverse order of their enumeration.

4. The instructions, asked for by the appellants and refused by the court, were not made part of the record of this cause, in either of the modes prescribed by law. Indeed, these instructions only appear in the appellants' motion for a new trial, as a part of the fourth cause assigned therefor, and they are not to be found elsewhere in the record. It is well settled by the decisions of this court, that instructions to a jury, whether given or refused, can not be made a part of the record of a case by setting them out or copying them in the motion for a new trial, as a cause therefor. Buskirk's Practice, 254, and cases there cited; *Burnett v. Overton*, 67 Ind. 557; *McDonald v. The State*, ante, p. 254. The recital in the motion for a new trial, that certain instructions asked for had been refused by the court, is simply the recital of an alleged fact by the appellants' attorneys, which cannot be taken as true by this court, unless its truth shall be or has been clearly and properly shown and established elsewhere, in and by the record. No such showing was made in or by the record of this action, and therefore it must be said, we think, that the truth of the fourth cause assigned for a new trial is not apparent in, nor established by, the transcript of the record on file in this court. It follows from what we have said, that the record fails to show either that the appellants asked for the written instructions to the jury,

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copied in their motion for a new trial as a part of the fourth cause therefor, or that the court had refused to give such instructions.

Besides, the court's instructions, given of its own motion to the jury trying the cause, were not made a part of the record, nor are they to be found in the transcript. In such a case, if it were conceded that the instructions, asked for by the appellants and refused by the court, were properly made a part of the record, and that each of them contained a correct statement of the law applicable to the case, still we could not say that the court had erred in refusing to give the instructions asked for. For it might well be in such a case, and the record would show nothing to the contrary, that the court refused to give the instructions asked for because it had already given the substance thereof in its own language. The court's reasons for its refusal to give the instructions asked by the appellants are not stated or apparent, but the record does not exclude the legal presumption that they were refused for sufficient reasons. *Fitzgerald v. Jerolaman*, 10 Ind. 338; *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298; and *Bowen v. Pollard*, 71 Ind. 177.

3. It is shown by a bill of exceptions properly in the record, that, when the appellees offered in evidence, on the trial of this cause, the deed from William H. and Mary A. Lee to Russell Hazeltine, of the real estate in controversy, "the defendants then and there objected" to the introduction of said deed, "which objection the said court overruled, to which ruling of the court the defendants then and there excepted." The record fails to show that the appellants stated to the court the grounds of their objection to the admission of the deed in evidence. In such a case the settled rule of practice is, that this court will not, on appeal, consider the question of the admissibility of the evidence, nor any objections here to its admission. *Bishplinghoff v. Bauer*,

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52 Ind. 519; *Rosenbaum v. Schmidt*, 54 Ind. 231; *McCormick v. Mitchell*, 57 Ind. 248.

2. The court committed no error, we think, in excluding from the jury the tax deed offered in evidence by the appellants, as the record fails to show that they either proved or offered to prove that the tax sale of the real estate, in pursuance of which such tax deed was executed, was legal and valid. The tax deed recited, *inter alia*, that the tax sale of the real estate, under which said deed was executed, had been made for the taxes "returned delinquent, in the name of William H. Lee, for the non-payment of taxes, costs and charges for the years 1856 and 1857." The personal property of the owner of realty was then, as it is now, primarily liable to distress and sale for the payment of all the delinquent taxes of such owner; and until such personal property, if any there were, had been exhausted, no legal or valid sale could be made of the owner's realty. The tax deed was made evidence by the law then in force as by the law now in force, "of the truth of all the facts therein recited;" but the tax deed offered in evidence by the appellants, in the case now before us, contained no recital to the effect either that the said William H. Lee had no personal property in said Boone county, during the said years 1856 and 1857, subject to distress and sale, or that his personal property, if any, had been exhausted before the offer and sale of his real estate for said delinquent taxes.

For the purpose of showing that the tax sale, pursuant to which said tax deed was executed, was a valid and legal sale, it became necessary, therefore, that the appellants should by proof *aliunde* establish the fact that said William H. Lee had no personal property in Boone county during the years 1856 and 1857, subject to distress and sale, or that his personal property, if any, had been exhausted before the said tax sale of said real estate. The only evidence offered by the appellants for this purpose, as shown by the record, is as

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follows: "And John W. Hedges testified that the records in his office aforesaid" (auditor of Boone county) "showed that there was no personal property assessed to William H. Lee for the year 1856." We need hardly say, for this is apparent, that this evidence was utterly insufficient to prove the facts necessary to be established under the law, for the purpose of showing the legality and validity of the tax sale, under and by virtue of which alone the tax deed offered in evidence was executed. We are clearly of the opinion that the court did not err in excluding this tax deed from the jury. *Cones v. Wilson*, 14 Ind. 465; *Ellis v. Kenyon*, 25 Ind. 134; *Bowen v. Donovan*, 32 Ind. 379; *Ring v. Ewing*, 47 Ind. 246; *Abbott v. Edgerton*, 53 Ind. 196; *Ward v. Montgomery*, 57 Ind. 276. Other objections have been pointed out by appellees' counsel to the validity of the tax deed, some of which seem to us to be well taken; but we need not extend this opinion in their examination, as we regard the one already considered as fatal to such deed.

1. The first cause for a new trial assigned by the appellants, as we have seen, was that the verdict was not sustained by sufficient evidence, and was contrary to law. It seems to us, however, that the verdict was fairly sustained by sufficient legal evidence. At all events, the evidence in the record strongly tended to sustain the verdict, on every material point; and in such a case the rule is so well settled that this court can not and will not disturb the verdict on the weight of the evidence, that we need not cite authorities in its support.

The motion for a new trial was correctly overruled.

The judgment is affirmed, at the appellants' costs.

Johnson v. The State, *ex rel.* Stout, Auditor.

No. 8340.

JOHNSON v. THE STATE, EX REL. STOUT, AUDITOR.

SCHOOL FUND MORTGAGE.—Sale of Land by Auditor.—Recorded Deed Must be Tendered to Purchaser.—A suit for the purchase-money of land sold by a county auditor, under a school fund mortgage, can not be maintained without a tender of the deed for the property, not absolute, but conditioned upon payment therefor, and recorded as required by section 99 of the act in relation to common schools, 1 R. S. 1876, p. 773.

From the Grant Circuit Court.

G. W. Harvey and *J. Brownlee*, for appellant.

R. W. Bailey, *A. Diltz*, *A. Steele* and *R. T. St. John*, for appellees.

WORDEN, J.—The auditor of Grant county sold a piece of land under a school fund mortgage, Jesse Johnson becoming the purchaser, at the sum of \$2,000. Johnson having failed to pay the purchase-money, a deed was tendered to him, and the money demanded, and this action was brought against him to recover the money. Johnson answered, among other things, as follows:

“6th Paragraph: For further answer said Johnson avers that the plaintiff did not cause said deed, referred to in plaintiff’s complaint, to be entered in the record of the board of commissioners of Grant county, in the State of Indiana, and recorded in said record, before a tender of the delivery of said deed was made by said auditor to this defendant. Defendant further says that said deed never has been recorded in the commissioners’ record of said county. Wherefore,” etc.

A demurrer to this paragraph, for want of sufficient facts, was sustained, and exception taken. Such further proceedings were had in the cause, as that final judgment was rendered for the plaintiff. Other persons were made parties, and other proceedings were had, not necessary to be noticed in this opinion. The same point made in the demurrer arises on the evidence.

Johnson v. The State, *ex rel.* Stout, Auditor.

We are of opinion that the court erred in sustaining the demurrer. The deed tendered was not recorded as provided for by law, and the defendant was not bound to accept it. The statute on the subject of such deeds provides that, "Upon full payment being made for such lands, the deeds thereof shall be executed by the county auditor, and shall be entered in the record of the board of county commissioners before delivery." 1 R. S. 1876, p. 802, sec. 99. But it is insisted that no tender of a deed at all was necessary before the right of action to recover the money was perfect.

We, however, do not see why the principle applied to sales by a sheriff, in this respect, should not apply to sales by auditors. It is settled in respect to sheriff's sales, that the payment of the purchase-money by the purchaser, and the execution of a deed by the sheriff, are concurrent acts, and that neither can proceed against the other without an offer to perform on his part. *Williams v. Lines*, 7 Blackf. 46; *The State v. Lines*, 4 Ind. 351. In the case last cited the court said: "The delivery of such deed and the payment of the purchase-money are to be concurrent acts. The vendee is not bound to part with his money until a deed for the premises is tendered."

But the appellee insists that the action will lie without the tender of a deed, inasmuch as the deed is to be executed only "upon full payment being made," etc.

The statute, we have seen, provides that, "Upon full payment being made for such lands, the deeds thereof shall be executed," etc.; but this, in our opinion, does not authorize a suit for the purchase-money without a tender, not absolute, but conditioned upon payment, of a deed for the property, recorded as the statute requires. There may be an express or an implied waiver of such tender on the part of the purchaser, but nothing of that kind is shown in the pleadings in this case.

Carr v. The Town of Fowler.

The judgment below is reversed, with costs, and the cause remanded for further proceedings, in accordance with this opinion.

Petition for a rehearing overruled.

74	520
152	109

No. 7930.

CARR v. THE TOWN OF FOWLER.

LIQUOR LAW.—License.—Town.—Prior to 1879, incorporated towns, in this State, had no authority to regulate and license the sale of intoxicating liquors.

From the Jasper Circuit Court.

M. H. Walker and *J. Burns*, for appellant.

D. E. Straight and *U. Z. Wiley*, for appellee.

BICKNELL, C.—The Town of Fowler, on February 27th, 1878, adopted an ordinance to license, regulate and restrain the sale of intoxicating liquors in that town, and soon afterward brought this action against the appellant for violating the ordinance, by selling intoxicating liquors without license. The complaint was in three paragraphs. The ordinance was in the common form.

The appellant demurred to each paragraph of the complaint, for want of facts sufficient to constitute a cause of action. The demurrers were overruled. The appellant filed an answer in four paragraphs. The appellee demurred to each paragraph of the answer, for want of facts sufficient to constitute a defence; said demurrers were sustained. The appellant refusing to answer further, the court rendered final judgment against the appellant for one hundred dollars.

The errors assigned are, that the complaint did not state facts sufficient to constitute a cause of action, and that the court erred in its several rulings upon the demurrers.

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In the case of *Redden v. The Town of Covington*, 29 Ind. 118, a judgment in favor of a town, upon its ordinance regulating the sale of liquors, was affirmed by this court; but in that case the authority of the town to make such an ordinance was not questioned.

It was held by this court, in *Hollenbaugh v. The State*, 11 Ind. 556, that the fourth clause of section 22, chapter 184, 1 R. S. 1852, 1 G. & H. 623, did not authorize an ordinance which declared the sale of intoxicating liquors to be a nuisance. The seventh clause of said section 22 gave authority to towns to license, regulate and restrain auctions, travelling pedlers and public exhibitions. It was held by this court, in *The Town of Martinsville v. Frieze*, 33 Ind. 507, that nothing in said section 22, as originally enacted, authorized towns to grant licenses to sell liquor, or to punish sales of liquor without license. It had been previously held, in *Kyle v. Malin*, 8 Ind. 34, that municipal corporations are to be held strictly within the limits prescribed by statute.

The act of March 11th, 1867, Acts 1867, p. 220, amended the seventh clause of said section 22, by adding thereto the words, "and the sale of liquors," etc. It was the purpose of this amendment to authorize towns to punish sales of liquor without license, but the amendment was held unconstitutional and void, because the section as amended was not set out at length. See *The Town of Martinsville v. Frieze*, *supra*; *The Town of Brazil v. Kress*, 55 Ind. 14; *The Town of Edinburg v. Hackney*, 54 Ind. 83; *Cowley v. The Town of Rushville*, 60 Ind. 327.

The said section 22 had been previously amended by the act of March 2d, 1855, Acts 1855, p. 128, and this amendment was held void, because it set out at length the amendments only, and not the entire section as amended. *Cowley v. The Town of Rushville*, *supra*.

Afterward said amending act of 1855 was amended by the act of March 1st, 1877, Acts 1877, Reg. Sess., p. 144, and

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this last mentioned amendment undertook to authorize towns to license, regulate and restrain the sale of intoxicating liquors; but this amendment of 1877 was also held invalid and void, because a valid law can not be made by pretending to amend a void statute. *Cowley v. The Town of Rushville, supra.*

It follows that, at the time the Town of Fowler adopted its ordinance aforesaid, there was no law which authorized incorporated towns to regulate and license the sale of intoxicating liquors. The ordinance, upon which this action was brought, was void. The complaint does not state facts sufficient to constitute a cause of action. The court below erred in its rulings upon the demurrers.

The judgment of the court below ought to be reversed, and the cause remanded, with instructions to that court to sustain the demurrers to the complaint.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellee, and that this cause be remanded, with instructions to the court below to sustain the demurrers to the complaint.

No. 8697.

THE STATE v. BLACKSTONE.

CRIMINAL LAW.—*Pleading.—Indictment.—Perjury.—Schedule of Property Returned for Taxation.*—An indictment for perjury in taking an oath to a schedule of property returned for taxation, under section 49 of the act of December 21st, 1872, 1 R. S. 1876, p. 81. must set forth an exact copy of the oath administered to the defendant, and if it purport to set forth only the substance and effect thereof, it is not sufficient on motion to quash.

SAME.—*Query.*—Ought not the indictment also to set forth by exact copy so much of the schedule as is relevant to the alleged perjury?

The State v. Blackstone.

From the Wells Circuit Court.

D. P. Baldwin, Attorney General, and *L. J. Baker*, Prosecuting Attorney, for the State.

WOODS, J.—The defendant was indicted for perjury, alleged to have been by him committed in taking the oath to his schedule of property returned for taxation for the year 1879. The indictment contains no copy of the schedule, but charges that the defendant listed the total value of his credits above indebtedness at the sum of seventeen hundred and sixty-seven dollars, to which statement he then and there subscribed his name and filed his affidavit and took his corporal oath, etc., and did depose and swear in substance and to the effect following, that is to say: “I, Jones Blackstone, being duly sworn, say that,” etc., and proceeding in the language of the oath prescribed by the statute, 1 R. S. 1876, p. 81, sec. 49. The indictment concludes with a proper charge that the oath was false in reference to the item of credits over indebtedness.

The court sustained a motion to quash this indictment, but, as there is no brief for the appellee, we have no information of the ground of the ruling, except the statement in the brief for the appellant that it was because a copy of the schedule was not set out in the indictment.

By the 44th section of the act defining felonies, it is provided that, “in indictments for perjury in swearing to any written instrument, it shall only be necessary to set forth that part of the instrument alleged to have been falsely sworn to, and to negative the same, with the name of the officer or court before whom the instrument was sworn to.” And in *Coppack v. The State*, 36 Ind. 513, it was held, under this statute, that an instrument, or a part of it, can not be “set forth” in any other way than to give the tenor thereof, or, in other words, an exact copy. Counsel for the appellant insist that they have complied with this rule; that

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“the perjury in this case consists in falsely swearing to the affidavit, of which the indictment sets out a complete copy.” But counsel are mistaken in this statement of the fact. The indictment does not purport to give the tenor, but only the substance and effect, of the affidavit which the defendant is charged with having subscribed and sworn to. It is true that the affidavit set out is an exact copy of the oath prescribed by the law, but, under the averments of the indictment, that oath is not shown to be the exact one which was administered to the defendant, but only the substance and effect thereof. This is not sufficient.

Without deciding, we may suggest the query whether the indictment ought not also to have set forth by exact copy so much of the schedule as is relevant to the alleged perjury; that is to say, in this case, items 1, 2, and 3, which relate to credits and indebtedness.

The judgment is affirmed.

No. 9242.

DYER v. THE STATE.

CRIMINAL LAW.—Practice.—Instructions.—Venue.—An instruction, in a trial of a criminal case, is not fatally defective because it does not inform the jury in terms that they must be satisfied that the alleged crime was committed in the county named in the indictment. The phrases “as charged” and “as alleged,” used in said instruction, informed the jury that they must be satisfied that the crime was committed at the place charged in the indictment.

SAME.—Absence of Evidence.—Presumption.—Without the evidence in the record, the Supreme Court can not judge of the applicability of instructions, or know that they were or were not pertinent to the evidence, and in such condition of the record will assume that the trial court did right. Error will not be presumed, but must be affirmatively shown.

Dyer v. The State.

SAME. — *Purity of Reagents.* — *Chemical Analysis.* — *Question for Jury.* —

When certain reagents are shown to have been employed in a chemical analysis to be used in evidence, the question of the purity or impurity of such reagents is one for the jury, and a presumption of their impurity can not be indulged in favor of the innocence of the defendant.

From the Noble Circuit Court.

V. C. Morris, J. Morris and J. I. Best, for appellant.

D. P. Baldwin, Attorney General, and *J. W. Bixler*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution for murder in the first degree. The indictment charged the appellant, John H. Dyer, with having, on the 8th day of January, 1879, at the county of Noble, in this State, feloniously, purposely and with premeditated malice, taken the life of Esther Dyer, his wife, by administering poison to her. The poison charged to have been administered was strychnia.

A jury found the appellant guilty of murder in the first degree, fixing his punishment at imprisonment in the State's prison during life, and a judgment of conviction followed upon the verdict.

The evidence is not in the record, and the only questions discussed by counsel for the appellant arise upon an instruction known as number 5, given by the court upon its own motion, and upon instructions designated as numbers 17 and 25, asked for by the appellant and refused by the court.

Instruction number 5, given by the court, was as follows: "If you are satisfied from the evidence in the cause, with the degree of certainty heretofore stated to you, that the poison charged was administered by the defendant, as charged, with the purpose on the part of the defendant to kill and murder his wife, and that death ensued, as alleged, in consequence thereof, this will be sufficient to sustain the indictment and convict the defendant."

It is contended that this instruction was fatally defective because it did not inform the jury that they had also to be

Dyer v. The State.

satisfied that the alleged crime was committed in Noble county.

We construe the instruction thus complained of as meaning that if the jury were satisfied that the poison was administered by the appellant, at the time, place, and in the manner charged in the indictment, with the purpose on his part of killing and murdering his wife, and that death ensued in consequence of the administration of such poison, that was sufficient to authorize the conviction of the appellant.

As thus construed, the jury were substantially told that they were required to be satisfied that the crime was committed at the place charged in the indictment, that is, in the county of Noble. The objection urged to the instruction can not, therefore, be sustained.

Instruction No. 17, asked for by the appellant, was as follows :

“It will also be proper for you to consider whether or not the defendant ever denied having purchased the strychnia. Whether he did not avow it consistently and at all times. Whether he had opportunity and could have concealed the strychnia, and whether, if guilty, he would have done so.”

Without the evidence before us, we are unable to judge of the applicability of this instruction to any portion of the evidence, or of its materiality in any essential respect. It may or it may not have been pertinent to the evidence. In this condition of uncertainty, we must assume that the court did right in refusing to give it, upon the theory that error will not be presumed, but must be affirmatively shown.

Instruction number 25, also asked by the appellant, was as follows :

“The presumption of innocence in favor of the defendant attaches to the question of the purity of the reagents employed in the chemical analysis of the contents of the stomach of the deceased, and unless the testimony shows that the reagents employed were pure and free from strychnia

Croy v. Clark.

or poison, then you must in this case regard such reagents as impure.”

We have the same difficulty with this instruction that we had with the preceding one. We have no means of knowing whether there was any evidence before the jury touching reagents or a chemical analysis of the stomach of the deceased. Besides, as an abstract proposition, we are not prepared to carry the presumption of innocence to the extent evidently contemplated by this instruction. We are rather inclined to the opinion that when certain reagents are shown to have been employed in a chemical analysis to be used in evidence, the question of the purity or impurity of such reagents is one for the jury, to be determined upon all the facts before it.

At all events we do not see how, under such circumstances, any presumption could be indulged against the purity of the reagents thus employed. No sufficient cause has been shown for a reversal of the judgment.

The judgment is affirmed, with costs.

No. 7318.

CROY v. CLARK.

PLEADING.—Co-Sureties.—Contribution.—Insolvency of Principal.—In an action by one surety against another for contribution, it is not necessary to either aver in the complaint or prove on the trial that the principal is insolvent.

From the Montgomery Circuit Court.

J. M. Thompson and W. H. Thompson, for appellant.

J. Wright and J. M. Seller, for appellee.

NEWCOMB, C.—The complaint in this case alleges that the appellant and appellee were co-sureties for Squire Clark on

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a promissory note executed to one Ferguson ; that the latter obtained judgment against the principal and sureties, which judgment the appellee had been compelled to pay. Prayer for judgment against appellant for his portion of the debt so paid.

The only question presented is whether it was necessary to aver in the complaint that the principal was insolvent. It has long been law in this State, that in an action by one surety against another for contribution, it is neither necessary to aver nor prove that the principal is insolvent. *Judah v. Mieure*, 5 Blackf. 171 ; *Rankin v. Collins*, 50 Ind. 158.

The judgment ought to be affirmed, with costs and ten per cent. damages.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things affirmed, at the costs of the appellant ; and that the appellees recover of the appellant the sum of twelve dollars and thirty-eight cents as and for his damages occasioned by said appeal.

 No. 6967.

THOMPSON v. JACOBS ET AL.

COSTS.—*Motion to Re-Tax.*—*Pleading.*—*Complaint.*—*Demurrer.*—*Money Voluntarily Paid.*—Where a complaint, considered as a motion to re-tax costs, shows that there was no claim pending in relation to the costs, that they had all been paid, and that the clerk was not claiming anything more as due, it is insufficient on demurrer ; and where such complaint fails to show that the payment of costs was made by the plaintiffs therein, and that it was not paid voluntarily, it is insufficient as a complaint to recover back the alleged illegal costs.

From the Johnson Circuit Court.

G. M. Overstreet and *A. B. Hunter*, for appellant.

W. H. Barnett, for appellees.

74	598
135	49
74	598
162	509

Thompson v. Jacobs *et al.*

FRANKLIN, C.—Appellees filed as a cause of action the following: “The plaintiffs say that at the September term of the Johnson Circuit Court, these plaintiffs filed an application for partition of the lands of Peter D. Jacobs, deceased, and an order was made for said partition, and commissioners were appointed to make said partition, who filed their report at the same term, and an order was made by said court confirming said partition. And that the defendant, who was then and there the clerk of said court, taxed the costs in said case at the sum of \$53.50, which costs have all been paid by the parties. A copy of the fee bill as taxed and made out by said clerk is filed herewith and made a part hereof. And plaintiffs aver that \$12.50 of the clerk’s fees as taxed and collected by the defendant is erroneous and illegal; that the legal fees in said case which accrued to said clerk was only the sum of \$6.85, instead of \$19.35, as shown by the correction and legal taxation of said fees filed herewith and made a part hereof. Wherefore the plaintiffs move the court for a re-taxation of said fees, and that the defendant be ordered to pay back to said plaintiffs the said sum of \$12.50, or, if that can not be done, that a judgment be rendered against said clerk in favor of the plaintiffs, for the said sum of \$12.50, and for costs, and for all other proper relief.”

Following which are two taxations of the costs; one we suppose to have been made by the clerk, and the other by the plaintiffs. To which cause of action a demurrer was filed by the defendant, overruled, and excepted to. Judgment for appellees.

As a motion to re-tax the costs, the cause of action was entirely nugatory. There was no claim pending in relation to the costs; the cause of action shows that they had all been paid, and it does not allege that the clerk was claiming anything more on the costs.

Cosby v. Anderson et al.

As a complaint to recover back the money, we think it insufficient; it alleges that the costs were paid by the parties, but does not show by what parties, or that the plaintiffs or either of them paid any part thereof. Neither does it show but that the payment was voluntarily made, and, if so, can not be recovered back. *Thompson v. Doty*, 72 Ind. 336; *The Town of Brazil v. Kress*, 55 Ind. 14; *Town of Edinburg v. Hackney*, 54 Ind. 83; *Stedman v. Boone*, 49 Ind. 469; *The Lafayette, etc., R. R. Co. v. Pattison*, 41 Ind. 312.

The court erred in overruling the demurrer to the cause of action.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and it is hereby, in all things, reversed, at costs of appellees.

No. 6458.

COSBY v. ANDERSON ET AL.

From the Gibson Circuit Court.

D. D. Doughty, for appellant.

BICKNELL, C.—This was an action on an account for goods sold and delivered, brought by Anderson & Hamilton against Cosby. Cosby admitted the account, but pleaded payment, which Anderson & Hamilton denied. The issues were tried by the court, who found for Anderson & Hamilton, one hundred dollars.

Cosby moved for a new trial for the reasons that the finding was not sustained by sufficient evidence, and was contrary to law; his motion was overruled; judgment was rendered upon the finding. He appealed to this court, and has assigned for error that the court erred in overruling his motion for a new trial.

We think there is evidence in the record tending to sustain the finding of the court below, and where that is the case, we cannot disturb the finding on a mere preponderance of evidence. *Ghormley v. Young*, 71 Ind. 62.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things, affirmed, at the costs of the appellant.

Meader v. The Town of Fowler.

No. 7931.

MEADER v. THE TOWN OF FOWLER.

From the Jasper Circuit Court.

M. H. Walker and *J. Burns*, for appellant.

D. E. Straight and *U. Z. Wiley*, for appellee.

BICKNELL, C.—The judgment in this case ought to be reversed, for the reasons stated in *Carr v. The Town of Fowler*, ante, p. 590. The material facts in the two cases are substantially alike, and they involve the same legal principles.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be, and the same is hereby, in all things reversed, at the costs of the appellee, and that this case be remanded, with instructions to the court below to sustain the demurrers to the complaint.

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ACTION ON ASSIGNED DEBT.

1. *Debt Must be Tangible and Well Identified Cause of Action.—Sale by Sheriff on Execution.—Assignment.—*Sections 438 and 439, 2 R. S. 1876, p. 208, construed together, mean that the debt or thing in action, which may be given up by an execution defendant and levied upon and sold by the sheriff and assigned and delivered by him, must be some tangible and well identified cause of action, upon which suit may be brought by the purchaser in the same manner as might have been done by the execution defendant, and capable of being assigned and delivered to the purchaser, such as a paper writing signed by some third person, a duly itemized account, or other chose in action described upon or by some paper. *Bay v. Saulspagh, 397*

2. *Same.—Complaint.—Insufficient Description of Claim.—Account.—*A complaint upon an assigned debt for "about eight hundred dollars," which gives no bill of particulars of the claim, or itemized statement or description of the account, or of the nature of the demand, is insufficient. *Ib.*
3. *Same.—Plaintiff's inability to obtain a better description or identification of the demand is a misfortune, for which averments that the execution defendant and all the defendants refuse to give him an itemized statement or bill of particulars, although often requested so to do, suggest no adequate remedy.* *Ib.*
4. *Same.—Sheriff's Assignment.—*The sheriff's assignment of a debt or thing in action, sold on execution, is not the foundation of an action brought upon the claim, and does not become a part of the complaint by being filed with it, and the facts recited therein can not be considered in aid of the averments of the complaint. *Ib.*

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2. *Same.—Intestate.—Entry Without Information Found.—Heirs.—*Where an alien dies intestate, owning real estate, leaving no one in possession and no known heirs, the State has title at once, and may enter and take possession without information found; otherwise she must first establish her title by information. *Ib.*
3. *Same.—Taxes After Escheat.—*After the legal title to the land of an alien has become vested in the State by escheat on his death without inheritable blood, any assessment of taxes upon the land, or its sale for delinquent taxes, is void. *Ib.*
4. *Same.—Limitation of Action.—*A counter-claim filed by the State within two years after the passage of the act of December 21st, 1872, 1 R. S. 1876, p. 72, is not barred by section 250 thereof. *Ib.*
5. *Same.—Evidence.—Estoppel in Pais.—*An estoppel in pais against the State from asserting her title to escheated land is not made out by the assessment of taxes thereon, its sale and conveyance for delinquent taxes, and the assessment and collection of taxes from the purchaser at the tax sale. *Ib.*

6. *Same.—Estoppel by Deed.*—An auditor's deed made in consummation of a sale for taxes can not bar the assertion by the State of any claim or right to the land sold. *Ib.*
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8. *Same.—Query.*—Can the State be estopped by the conduct of public ministerial officers? *Ib.*

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1. *Approval by Clerk.—Consent of Plaintiffs by Attorney.—Mutual Waiver.—Superior Court.*—Where a superior court in special term fixed the penalty and time of filing of an appeal bond, leaving the approval of the surety to the clerk, and the bond, with the written consent of plaintiffs by attorney endorsed thereon, was approved by the clerk, the defendants, in a suit on the bond, can not dispute the authority of the attorney whose act they have ratified, but the parties must be held to have mutually waived any approval by the court and to have made the bond just as effective as if the statute had been conformed to with technical accuracy. *Smock v. Harrison, 348*
2. *Same.—Superior Court.—Conditions of Appeal Bond.—Waiver.—Measure of Recovery.*—Granting that the conditions of a bond in case of appeal from special to general term of the superior court must be directed by the court, the parties may waive that requirement and themselves name the conditions as well as the sureties, and, within the penalty of the bond agreed upon, the amount due on the judgment appealed from is the measure of the recovery which may be had, and this without averment or proof that the judgment defendants have become insolvent. *Ib.*

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Practice.—Service.—Record.—Where the record shows neither a return of service of summons on a defendant, nor any appearance on his behalf, the entry, "come again the parties by their counsel," etc., is not binding upon him. Such entry is binding only on those for whom there had been an actual appearance, which must be affirmatively shown in some part of the record. *Fee v. State, ex rel., 66*

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1. *Sufficiency of Complaint.—Separate Paragraphs.—Practice.—Supreme Court.—Motion.*—The sufficiency of a complaint, as a whole, may be assigned as error in the Supreme Court, and so the sufficiency of each paragraph be brought under review, but separate assignments on the respective paragraphs can not be made. An assignment of error, to be good, must be such, if true, as to require the reversal of the judgment; but, if any paragraph of the complaint is good, the sufficiency of other paragraphs can not be questioned, either by a motion in arrest or by an assignment of error that it does not state facts sufficient. *Trammel v. Chipman*, 474
2. *Same.*—The assignment of errors is, in effect, the appellant's complaint in the Supreme Court, and, like the paragraphs of a complaint, each separate specification of the assignment of errors must in itself state a sufficient cause for reversing the judgment. *Ib.*
3. *New Trial.*—Matter constituting cause for a new trial can not be assigned as error for the first time in the Supreme Court, and, if so assigned, will present no question for decision. *Edwards v. Powell*, 294

ATTACHMENT.

1. *Mortgage.—Notice of Pending Suit.*—Where a creditor takes a mortgage upon land which has been levied on in attachment proceedings by other creditors, and which is in the custody of the court, he is chargeable with notice of the litigation pending in relation to such property. *Fee v. Moore*, 319
2. *Jurisdictional Fact.—Judgment.—Collateral Attack.*—The question as to whether claims had been filed under an original attachment proceeding and had become a part thereof, is a jurisdictional question necessary for the court to determine before it could act, and its determination of that question, and its judgments rendered on such claims, where the court is one of general jurisdiction, can not be collaterally questioned. *Ib.*
3. *Lien of Attaching Creditor and Parties Filing Under his Proceedings.*—Creditors filing under an attachment proceeding acquire all the rights and liens of the attaching creditor, and are entitled, jointly with him, to a *pro rata* distribution of the proceeds of the attached property. *Ib.*
4. *Lien on Property Attached.—Debtor can not Encumber Property in Custody of Court.*—The order of attachment, in attachment proceedings under the statute, binds the property of the defendant in the county, and creates a lien thereon from the time it comes into the hands of the sheriff; and the seizure of such property by the sheriff places it in the custody of the court, and thereby prevents such defendant from disposing of the same or creating any incumbrance or lien thereon, until not only the attaching creditor has been paid, but all others filing under the attachment proceedings, and becoming parties thereto, have been fully paid, should there be sufficient property. *Ib.*
5. *Lien of Parties Filing Under Attaching Creditor.—Lien of Mortgagee.*—The lien of a creditor filing under an original attachment proceeding against real estate, commenced prior to the execution of a mortgage

thereon, by the attachment defendant, is prior and paramount to the lien acquired by the mortgagee upon such real estate, although the date of the filing of such creditor's claim is subsequent to the execution of the mortgage. *Ib.*

6. *Right of Creditor to File Claim Under Proceedings Terminates with Judgment.—Statute Construed.*—The right of creditors to file claims under an attachment proceeding against a debtor, under section 186 of the code, 2 R. S. 1876, p. 110, terminates with the final judgment and order of sale of the attached property, the words "final adjustment," as used in said section, meaning the judgment directing a recovery and ordering a sale of the property seized under the writ of attachment. *Cooper v. Metzger, 544*

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1. *Promissory Note.—Contract of Endorsement.—Parol Evidence not Admissible to Contradict or Vary.—Presumption.*—An endorsement of a promissory note or bill of exchange, regularly following that of the payee, constitutes a certain and defined contract, with a legal force and meaning as complete and certain as if all the conditions and stipulations of the contract had been written out at full length, and parol evidence is inadmissible to modify or contradict such a contract of endorsement; but the endorsement of a note or bill not previously endorsed, or not endorsed at all, by the payee, is an irregular proceeding, and the contract created by it is not one of fixed and definite legal import. *Stack v. Beach, 571*
2. *Same.—Exceptions to Rule as to Admission of Parol Evidence.*—While it is the general rule that a contract of endorsement regularly following that of the payee can not be varied or contradicted by parol evidence, yet such evidence is admissible to show that the endorsement was for the purpose of creating a trust; that it was for collection merely; that the instrument was endorsed as collateral security, or delivered as an escrow, or endorsed to an agent for a particular purpose. *Ib.*

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1. *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Burns v. Harris*, 66 Ind. 536, as to the sufficiency of description in chattel mortgage, distinguished. *Tindall v. Wasson*, 495
2. *The State, ex rel. Dickerson, v. Harrison*, 67 Ind. 71, as to the power to elect county superintendent on day other than that prescribed by law, distinguished. *Sackett v. State, ex rel.*, 486
3. *Wilson v. The State*, 28 Ind. 393, as to the invalidity of judgment following verdict, distinguished. *Shafer v. State*, 90
4. *Reed v. The State*, 12 Ind. 641, in relation to the prosecution of felonies by affidavit and information overruled. *Jones v. State*, 249
5. *Seward v. Clark*, 67 Ind. 289, and *Bell v. Mousset*, 71 Ind. 347, in relation to appeals by executors and administrators, distinguished. *Willson v. Binford*, 424
6. *Williams v. The State*, 64 Ind. 553, in relation to allegation in indictment for offence committed in a public place, overruled. *State v. Moriarty*, 103
7. *Cruzan v. Smith*, 41 Ind. 288, as to admissions in excepting to conclusions of law, explained. *Robinson v. Snyder*, 110
8. *Armstrong v. Berreman*, 13 Ind. 422, as to rights of widow in estate of her deceased husband under the law and under a will, distinguished. *Ragsdale v. Parrish*, 191
9. *Sill v. Leslie*, 16 Ind. 236, as to the presumption of liability of an endorser of a promissory note, distinguished. *Kealing v. Vansickle*, 529
10. *Mallett v. Page*, 8 Ind. 364, as to consideration of note given by testator to equalize provisions in his will, criticised and explained. *West v. Cavins*, 265
11. *The St. Louis, etc., R. W. Co. v. Valirius*, 56 Ind. 511, as to negligence of employer in use of machinery, in case of injury to employee, criticised. *Lake Shore, etc., R. W. Co. v. McCormick*, 440

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CHANGE OF VENUE.

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1. *Affidavit.—Statute Construed.*—Under the third clause of section 207 of the code, as amended by the act of March 5th, 1877, Acts 1877, Reg. Sess., p. 103, the affidavit of the defendant for a change of venue must specifically set forth the defence. The general statement therein, "that the affiant has a good and meritorious defence to said action, as set forth in his answer," is insufficient.

Bowen v. Bowen, 470

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CHATTEL MORTGAGE.

1. *Description.*—Property described in a chattel mortgage as "one-third of twenty-two acres of growing wheat, situate," etc., means the undivided one-third of such wheat, and is a sufficiently particular description. *Zehner v. Aultman*, 24
2. *Same.—Demand.*—Where a chattel mortgage is duly recorded, no demand for the mortgaged property of a purchaser thereof is necessary before suit to foreclose the same. *Ib.*
3. *Description of Property.—Pleading.—Answer.—Demurrer.—Evidence.—Cases Distinguished.*—In an action by the holder of a chattel mortgage to recover the possession of the property mortgaged, the an-

swer of the vendee of the mortgagor averred that the only description of the property contained in the mortgage is "two mule colts, one year old next spring."

Held, on demurrer to the answer, in the absence of any showing which would enable the description to be made certain by parol evidence, that such description is insufficient. *Duke v. Strickland*, 43 Ind. 494; *Ebberle v. Mayer*, 51 Ind. 235; *Burns v. Harris*, 66 Ind. 536, distinguished. *Tindall v. Wasson*, 495

4. *Same.—Description of Property Intended to be Mortgaged.—Identification.*—A description in a chattel mortgage which will enable third persons, aided by inquiries which the instrument itself indicates and directs, to identify the property, is sufficient. *Ib.*
5. *Same.—Evidence.*—Parol evidence is admissible to identify the particular property described in a chattel mortgage; that is, parol evidence may aid, not make, a description in such mortgage. *Ib.*

CHEMICAL ANALYSIS.

See CRIMINAL LAW, 48.

CITIES AND TOWNS.

See LIQUOR LAW, 12; NEGLIGENCE, 11 to 14.

1. *Streets.—Title of Adjoining Proprietor.—Town Laid Out by State.—Indianapolis.*—The State, in laying out for its seat of government, upon land donated by the United States for that purpose, the town of Indianapolis, and making and filing maps thereof, as required by law, vested in the town, for the use of the public, such rights to the streets and alleys, and such interest therein, as would have vested in it had any citizen been the proprietor of the land, and had laid out the town in the same way; and the grantee in fee simple, in a conveyance by the State through its agent, of a lot by its number, abutting upon a public street in said town, and his assignees, acquired such rights to said street and such interest therein as would be conferred by a like conveyance made by such a citizen proprietor of a town; that is, such grantee and his assignees took the fee, subject to the public use, to the center line of such adjoining street. *Terre Haute, etc., R. R. Co. v. Scott*, 29
2. *Same.—Railroad.—Appropriation of Land.—Construction of Charter.*—Where the charter of a railroad company provides that, in all cases where the owner of lands necessary for the use and construction of its road "shall refuse to relinquish the same to the corporation, or shall refuse to accept a fair compensation therefor," it shall be lawful for the corporation to enter and take possession of and use such lands, and that the owner of the lands, who feels aggrieved or injured by such use thereof, shall make application to a justice of the peace for an appraisalment of damages, and that there shall be no recovery by such owner unless such an application be made by him within two years, such provisions will be strictly construed as against the owner of land taken, and such limitation will not apply as against the owner of a lot abutting upon a public street of a city, incorporated under the general law for the incorporation of cities, upon his side of which street such railroad company has maintained its track for fifteen years, upon a level with the grade of the street, with the authority of such city, but without the consent of the owner of such lot, without having demanded of him a relinquishment of his title to the street, and without having offered him a fair compensation; and against the railroad company so occupying the street, such adjoining proprietor may have the usual remedies for the protection of rights in real property. *Ib.*

3. *City.—City Treasurer.—Compensation.—Statute Construed.—Taxes.*—The act of March 11th, 1875, Acts 1875, Reg. Sess., p. 148, legalizing the assessment and collection of municipal taxes, was not designed to, nor did it in any way, change the law concerning the salary, compensation, fees, or emoluments of city treasurers.
Board of School Commissioners, etc., v. Wasson, 133
4. *Same.—Salary of City Treasurer.—Statute Construed.—Taxes.—School Commissioners.*—By section 51 of the act for the incorporation of cities, 1 R. S. 1876, p. 267, city treasurers are to be paid for general services a salary to be accurately determined and fixed on some certain basis by the city council. It may be a percentage on the taxes levied, but it can not be on the taxes collected during the year; nor are city treasurers entitled, in addition to such salary, to a percentage of the taxes collected by them, assessed by the city board of school commissioners, by the provisions of the act of March 3d, 1871, 1 R. S. 1876, p. 817, in relation to schools in cities of thirty thousand or more inhabitants. *Ib.*
5. *Same.—Salaries of City Officers.*—There is no authority in said act of March 3d, 1871, for a city or its officers to charge any part of the salaries of its officers named in section 51, *supra*, against the taxes collected for the city school corporation. *Ib.*
6. *Same.—Fees and Charges for Collecting Taxes.—Distress and Sale.*—The fees and charges allowed a city treasurer for the collection of taxes by distress and sale, by section 44 of the act for the incorporation of cities, are such only as are allowed constables on an execution sale, and do not include the percentage allowed county treasurers for similar services, and such fees and charges are collectible out of the property of the taxpayer in each case, and can be deducted from the amount of the tax, interest and penalty only in case the sum realized is insufficient to pay both. *Ib.*
7. *Same.—Presumption.—Complaint.—Demurrer.*—Upon a demurrer to a complaint in an action by the board of school commissioners of a city, against the city treasurer, to recover school tax levied by them and claimed by such treasurer as fees and charges for collections made by distress and sale, it will be presumed that such officer levied on property sufficient to pay all that was due, including his own fees and charges. *Ib.*
8. *City.—Liability of, as Stockholder in Railroad Company.—Work and Labor.*—A city, having subscribed to the stock of a railroad company, under the act of May 4th, 1869, authorizing cities to aid in the construction of railroads, 1 R. S. 1876, p. 299, is bound by the same liability which, under section 38 of the act for the incorporation of railroad companies, 1 R. S. 1876, p. 712, attaches to an ordinary stockholder in such company, for labor done in the construction of its road.
Shipley v. City of Terre Haute, 297
9. *Notice to Councilman of Defects in Street or Bridge.*—Under the statutes of this State, notice to a councilman of a city, of the dangerous condition of a street or bridge within the city, is notice to the city. *ELLIOTT, J., dissents. City of Logansport v. Justice, 378*
10. *Same.—Agents.—Notice.*—In this State, for the purpose of receiving notice, councilmen of a city are at all times the agents of the city. *Ib.*
11. *Same.—Continuance of Defective Condition of Bridge.—Presumption of Notice.*—Notice to a city of the defective condition of a bridge therein will be presumed from the continuance of such condition a sufficient length of time for the officers of such city to have had an opportunity to learn of such defect. *Ib.*
12. *Same.—Diligence in Making Repairs.*—A city is responsible only for reasonable diligence to repair defects in its streets or bridges, or to

prevent accidents therefrom after such defects are known; but where, on failure, after notice in due time to have made repairs of such defects, an injury occurs therefrom, the city is liable. *Ib.*

13. *Same.—Measure of Damages.—Loss of Business.—Evidence.*—In an action by a physician against a city, to recover damages for a personal injury received on account of a defective bridge, proof of his professional earnings before and after the injury is admissible in evidence under a special allegation of damages on account of loss of business, not as a basis or measure of damages, but as aiding the jury in estimating the compensation to be awarded. *Ib.*

14. *Same.—Instruction.—Assumption of Fact.*—An instruction that, "If the bridge in question, being within the city, was defective," etc., does not assume that the bridge was within the city. *Ib.*

15. *City.—Negligence.—Impounding Animals Running at Large.—Ordinance.—Complaint.*—A complaint against a city, alleging that its pound fence was not high enough, that an animal impounded by the city was improperly tied, and that thereby, without the plaintiff's fault, the animal sustained injuries, contains a good cause of action. Municipal corporations are responsible to the same extent, and in the same manner, as natural persons, for injuries caused by the negligence or unskilfulness of their agents in the construction of works for the benefit of the cities or towns under their government.

City of Greencastle v. Martin, 449

16. *Same.*—For any negligence of its agents in the construction of a pound, or in any purely ministerial duty under a pound ordinance, a city is liable, just as a private person would be for the acts of his agents. *Ib.*

17. *Same.—Conversion.—Particulars.—Demurrer.*—That a paragraph of complaint, alleging conversion, does not give the particulars of the conversion, is not a ground of demurrer. *Ib.*

18. *Same.—Pound Ordinance.—Police Regulation.—Harmless Inaccuracy.—Instruction.*—A pound ordinance is a police regulation authorizing summary proceedings, and must be strictly adhered to; but a statement in an instruction that it is "penal in its nature," is but a slight inaccuracy, could do no harm, and ought to be disregarded. *Ib.*

19. *Evidence.—Conversion.—Pleading.*—Where there was no proof of a wrongful appropriation, or of intent to make a wrongful appropriation, of an animal impounded by a city marshal under a city ordinance, a finding against the city, upon a paragraph of complaint charging such a conversion by the city, is not sustained by the evidence. *Ib.*

20. *Same.—Negligence.*—A paragraph of complaint charging a city with negligence in four particulars: 1st, building the pound fence too low; 2d, tying the animal of plaintiff with a rope too long; 3d, failing to post up notice of impounding; and, 4th, failing to offer the animal for sale at the end of forty-eight hours after the posting, is not sustained by sufficient evidence, where no witness testified that the fence was too low, or that the animal was improperly tied, or that the failure to post notices or to sell produced the injury complained of, or had any tendency to produce it. *Ib.*

21. *Same.*—A city is not shown to have been guilty of the negligence which was the proximate cause of an injury to an animal confined in a pound, when it appears that the animal ruined itself by a wild and vicious effort to overleap a fence sufficient to confine any ordinary animal of the horse kind. *Ib.*

22. *Same.—Pound Fence.*—When a pound fence intended to confine horses and cattle is proved to be sufficient for its purpose by competent and credible witnesses, and no testimony is introduced to the

contrary, such proof settles the question as to the sufficiency of the fence, and the mere fact that an animal confined in such pound, and properly cared for there, kills itself by rushing against such fence, or by kicking against it, or by trying to clear it in leaping, does not impair the testimony of those witnesses, and has no tendency to prove the insufficiency of the fence. *Id.*

23. *City. - School Trustee.—Vacancy.—Appointee to Hold Until Successor is Elected.*—A school trustee appointed to fill a vacancy in the office of school trustee of a city, under the act of March 12th, 1875, Acts 1875, Reg. Sess., p. 135, is entitled, by force of the 3d section of the fifteenth article of the constitution of the State, to hold such office until his successor is elected and qualified. *Sackett v. State, ex rel., 486*
24. *Same.—Election.—Term of Office.—Statute Construed.*—By section 1 of said act, *supra*, it was intended to create in each town and city of the State a board of school trustees, composed of three members, one to be elected and take his office each year, and each to hold office for three years; but, in so far as said section prescribes the time when the election shall be held, it is directory only. *Id.*
25. *Same.—Election to be Held Annually in June, but Valid Election may be Held on Subsequent Day.—Case Distinguished.*—Under such section, successive annual elections for a school trustee should be held at the first regular meeting of the council in June; but this does not limit the power of the common council of a city to elect only on such day, and a valid election may be had upon a subsequent day. *The State, ex rel. Dickerson, v. Harrison, 67 Ind. 71, distinguished. Id.*

CITY TREASURER.

See CITIES AND TOWNS, 3 to 7.

COLLATERAL ATTACK.

See ATTACHMENT, 2; DECEDENTS' ESTATES, 3; DITCHES AND DRAINS, 6; JURISDICTION, 2; REAL ESTATE, ACTION TO RECOVER, 3.

COMMENCEMENT OF ACTION.

See PRACTICE, 9.

COMMON SCHOOLS.

See COUNTY AUDITOR; PLEADING, 13; PROMISSORY NOTE, 1; STATUTE OF LIMITATIONS, 1.

CONCEALMENT.

See STATUTE OF LIMITATIONS.

CONFESSION OF JUDGMENT.

See REPLEVIN BAIL, 4.

CONGRESSIONAL TOWNSHIP SCHOOL FUND.

See STATUTE OF LIMITATIONS.

CONSIDERATION.

See MARRIAGE; PLEADING, 21; PROMISSORY NOTE, 2; REAL ESTATE, 8; TRUSTS.

CONSIGNMENT.

Railroad.—Delivery at Station. Township Trustee.—Where maps had been purchased by a township trustee, their delivery at the railroad station, after the time agreed, with notice to him, vested their ownership in the school township, subject only to his right to refuse to receive them, for sufficient reason, and relieve the railroad company of any further obligations to the consignor. *Moral School Tp. v. Harrison, 93*

CONSTABLE.

1. *Breaches of Bond.—Answer.—Demurrer.*—To a complaint on a constable's bond, alleging his failure to demand, levy upon, and sell prop-

erty of the execution defendant, and relator's consequent loss of his judgment, an answer that the constable went to the residence of the execution defendant, demanded of him property whereon to levy, was refused, and thereupon made "diligent search" and utterly failed to find such property, is sufficient on demurrer.

State, ex rel., v. Neff, 146

2. *Same.—Diligent Search.*—"Diligent search" is a fact, the truth of which is admitted by demurrer, and, if too broadly stated, the only remedy, if any, is a motion for a more specific statement of the facts of the search. *Ib.*
3. *Same.—Insolvency of Execution Defendant.*—An answer, that at the time of the receipt of an execution, and continuously thereafter during the term of office of the constable, the execution defendant was insolvent, is a complete bar to the relator's cause of action. Insolvency may be averred as an existing fact. *Ib.*
4. *Same.—Instructions.—Partial Satisfaction of Execution.*—Instructions that, to entitle a relator to recover on a constable's bond, the execution defendant must have been the owner of personal property subject to execution, of which the amount of relator's execution could have been made, are erroneous. It is enough that a part of the amount could have been made. *Ib.*

CONSTITUTIONAL LAW.

See CITIES AND TOWNS, 23; COUNTY COMMISSIONERS, 3; CRIMINAL LAW, 19, 20, 25, 29.

Title of Act.—Section 38 of the act for the incorporation of railroad companies, 1 R. S. 1876, p. 712, is constitutional, its provisions being matter properly connected with the subject of the title of such act, within the meaning of section 19, article 4, of the constitution.

Shipley v. City of Terre Haute, 297

CONTINUANCE.

See CRIMINAL LAW, 34; FRAUDULENT CONVEYANCE; SUPREME COURT, 2.

CONTRACT.

See BILL OF EXCHANGE; COUNTY COMMISSIONERS, 2, 4; DITCHES AND DRAINS, 8; INFANCY, 1; LANDLORD AND TENANT, 4 to 6; MARRIAGE; PROMISSORY NOTE.

1. *Rescission of.—Township Trustee.—Notice.*—Where a trustee, who has executed a note in the name of his school township, in advance of the delivery of maps purchased, desires to rescind the contract, on account of delay in performance, it is incumbent on him to notify the consignors of such intention, to return the maps, or do some other act disaffirming the contract. *Moral School Tp. v. Harrison, 93*
2. *Evidence.—Member of Family.—Insufficiency of Evidence to Sustain Finding.*—Upon a trial, in an action to recover for work and labor, the evidence showed that the plaintiff, while under guardianship, went to live with the defendant, her uncle, under an agreement made with him by her guardian that she should live with him as a member of his family, and be boarded, clothed and educated by him; that nothing was said about wages or pay; that under this agreement she continued to live with the family until her majority, and until her marriage, eight years thereafter, never asking or demanding wages or pay for her services, the defendant providing for her support and treating her substantially as a member of his family; that, from the time of her majority until shortly before her marriage, she had loaned her money to her uncle, he paying her interest therefor, and that upon settlement with him she had allowed him a certain sum for clothing furnished her.

Held, that the evidence was insufficient to entitle the plaintiff to recover.

Brown v. Yaryan, 305

3. *Correction of. — Mutual Mistake. — Complaint. — Verdict. — Pleading. — Practice.*—Where the complaint upon a contract alleges a mutual mistake as to the terms thereof, and its averments show exactly what figures the parties agreed and intended to have inserted instead of those written therein, it is good on demurrer, and certainly sufficient after verdict. *Trammel v. Chipman*, 474
4. *Same. — Conditional Promissory Note. — Demand.*—No demand is necessary before suit upon a promissory note executed payable on condition that the maker should be unable to show that he had forwarded to the payee a certain sum on account of revenue taxes collected by the maker as deputy of the payee. *Ib.*
5. *Intention of Parties.*—The intention of the parties to a contract must be gathered from the language of the contract, and where that is plain, and there is no mistake in it, it is conclusive. *Reed v. Lewis*, 433.

CONTRIBUTION.

See PLEADING, 26.

CONVERSION.

See CITIES AND TOWNS, 17, 19; PARTNERSHIP, 1.

CONVEYANCE.

See CITIES AND TOWNS, 1; ESTOPPEL, 1; FRAUDULENT CONVEYANCE; PARTITION, 3; REAL ESTATE, 1, 3.

1. *Disaffirmance. — Voidable Deed.*—A voidable deed may be disaffirmed by entry on the land, by a written notice of disaffirmance, by a subsequent conveyance, or by any other equally emphatic act, declaratory of an intention to disaffirm. *Long v. Williams*, 115
2. *Same. — Act of Disaffirmance.*—It is the act of disaffirming which destroys a voidable deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made. *Ib.*
3. *Same. — Possession not Necessary to Disaffirm.*—It is not necessary that the grantor in a voidable deed should be in a position to recover the possession of the land conveyed, when the disaffirmance of the deed is made. *Ib.*
4. *Same. — Insufficient Excuse for Failure to Disaffirm.*—The possession of real estate by a widow, under right of dower, is no excuse for the failure of a minor heir, to whom the fee belongs, to disaffirm a deed made thereto within a reasonable time after arriving at full age. *Ib.*

COPY.

See MORTGAGE, 10; PLEADING, 16.

CORPORATION.

See CITIES AND TOWNS; CRIMINAL LAW, 36, 37.

COSTS.

See MORTGAGE, 8.

Motion to Re-Tax. — Pleading. — Complaint. — Demurrer. — Money Voluntarily Paid.—Where a complaint, considered as a motion to re-tax costs, shows that there was no claim pending in relation to the costs, that they had all been paid, and that the clerk was not claiming anything more as due, it is insufficient on demurrer; and where such complaint fails to show that the payment of costs was made by the plaintiffs therein, and that they were not paid voluntarily, it is insufficient as a complaint to recover back the alleged illegal costs.

Thompson v. Jacobs, 598

COUNTER-CLAIM.

See ALIEN, 1, 4.

COUNTY AUDITOR.

See ALIEN, 6; SCHOOL LAW; STATUTE OF LIMITATIONS; TAXES.

1. *Not Trustee of Congressional Township School Fund.—Common School Fund.*—The auditor of the county is not a trustee of the congressional township school fund. *Ware v. State, ex rel., 181*
2. *Same.—Void Loan.*—A loan of one thousand dollars, made by the auditor of a county to himself, is void, although all the requirements of the statute have been observed. *Ib.*

COUNTY CLERK.

See APPEAL BOND, 1; REPLEVIN BAIL, 5, 7.

COUNTY COMMISSIONERS.

See DITCHES AND DRAINS; STATUTE OF LIMITATIONS, 2, 3.

1. *County Work.—Gravel Road.—Statute Construed.*—When the commissioners of a county take charge of the construction or improvement of a free gravel road, such construction or improvement becomes at once a county work, within the meaning of the act of March 14th, 1877. Acts 1877, Spec. Sess., p. 29. *State, ex rel., v. Sullivan, 121*
2. *Same.—Bond.—Contract.*—When any work is placed in charge of the commissioners as a county work, they are required to take a bond which shall guarantee the faithful performance and execution of the work, and that the contractor shall promptly pay all debts incurred by him in the prosecution of such work, including labor, material furnished, and for boarding the laborers. *Ib.*
3. *Same.—Title of Act.—Boarding Laborers.*—The subject-matter and general character of the act of March 14th, 1877. are fairly expressed in the title, and it comprehends the provision for the payment of persons boarding laborers. *Ib.*
4. *Same.—Jurisdiction.*—Until the commissioners of a county have acquired jurisdiction over a gravel or other similar road, and ordered either its construction or improvement, they are wholly without authority either to let a contract for work upon such a road or to take such a bond. *Ib.*
5. *Jurisdiction.*—The board of county commissioners is a court of special limited jurisdiction, possessing only such powers as the statute confers. Not only is its jurisdiction restricted, but the mode of exercising its authority is a limited, statutory one. *Doctor v. Hartman, 221*
6. *Same.—Highway.—Viewers, Report of.—Public Utility.*—Unless a highway is of public utility, it can not be opened across the lands of persons objecting thereto, even though the petitioners therefor are willing to open and maintain it at their own expense; and whether a highway is or is not of public utility is a matter of which the commissioners are informed by the report of viewers. *Ib.*
7. *Same.—Report of Viewers must be Acted on.—Judgment.*—The report of viewers appointed by a board of commissioners, upon petition for the location of a highway, whether favorable or unfavorable to the petitioners, must be acted upon by the board, and, if adverse to the petitioners, the board must pronounce some judgment thereon. Such report stands in the same relation to such board as the verdict of a jury to the court, and the board should pronounce judgment upon it, except in cases where the statute provides differently. *Ib.*
8. *Same.—Power to Set Aside Report of Viewers.—Reviewers.*—There are but two cases in which authority is given the board of commissioners to set aside the report of viewers, and appoint reviewers, and these cases are especially provided for by sections 19 and 23 of the act in relation to highways, 1 R. S. 1876, p. 528, and there are no other cases in which such authority can be implied. *Ib.*
9. *Same.—Approval of Report of Viewers.—Final Judgment, no Power to Set Aside.*—Where the report of viewers is adverse to the petitioners for the location of a highway, and judgment has been entered by the

- board of commissioners approving the report, such board has no right to set aside such judgment and appoint reviewers. *Ib.*
10. *Same.—Right to Set Aside Final Judgment.*—The right to set aside final judgments is not an ordinary incident of the jurisdiction of courts of limited statutory jurisdiction. *Ib.*
11. *Record. — Finding. — Petition for Appropriation to Railroad.— Election.—Interpolation of Record.*—The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to vote aid for the construction of a railroad, "And proof being made that twenty-five of the petitioners are freeholders of Clinton township." is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated. *Goddard v. Stockman, 400*
12. *Same.—Signing Record of Proceedings.—Unsigned Orders not Void.*—While it is the better practice that the record of the proceedings of a board of county commissioners should be signed by the members thereof, yet unsigned orders of the board are not void, and, when properly signed within a reasonable time, become valid from the time when made. *Ib.*
13. *Same.—Conditions to Appropriation to Railroad.—Statute Construed.*—A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation. The act of March 8th, 1879, Acts 1879, p. 46, enables petitioners and voters to annex conditions to appropriations, but does not compel them to do so if they do not desire any conditions. *Ib.*
14. *Same.—Contesting Validity of Election.—Appeal from Order of Board.—Injunction.*—While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof. *It.*
15. *Same.—Levy of Less than One-half of Donation.—Appeal.*—If, in such case, the one per cent. levied for the current year amounted to less than one-half of the amount of the donation asked, the remedy therefor is by appeal from the order whereby the levy was made. *It.*
16. *Same.—Granting Prayer of Petitioners.—Sufficiency of Order.*—The recital in the record of the order of the board of commissioners making such an appropriation, that "it is hereby ordered that a special tax of one per cent. * * be and the same is hereby levied, * * for the purpose of raising one-half of the amount specified in said petition," is a sufficient granting of the prayer of the petition. *It.*
17. *Same.—Property Omitted from Taxation Does not Render Tax on Other Property Invalid.*—If, in making the levy for such donation, certain taxable property of the township was omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid. *Ib.*

COUNTY TREASURER.
See FEES AND SALARIES.

COVERTURE.

See HUSBAND AND WIFE; PARTITION, 3.

CRIMINAL LAW.

1. *Murder.—Evidence. Insufficiency of to Sustain Conviction.*—Where, on the trial of a defendant indicted for murder, the evidence tended to show that the accused was at his home, and that the deceased had followed him there for the purpose of forcing him into a fight, and that in the altercation the deceased, in assaulting the accused, was fatally stabbed by him, such evidence is insufficient to sustain a conviction of the crime of murder in the second degree. *Miller v. State, 1*
2. *Same. — Self-Defence. — Assault. — Justifiable Homicide.*—It is not necessary for one to flee from his home to avoid a fight thrust upon him by an assailant, in order to justify or excuse a homicide resulting therefrom. Being without fault, and in a place where he has a right to be, if violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable. *Ib.*
3. *Gaming. — Pleading. — Indictment. — Surplusage.*—An indictment, averring that the defendant did “keep his said room and tenement to be used for gaming,” sufficiently charges the offence of keeping a house for gambling, under the first branch of section 20 of the act concerning misdemeanors, 2 R. S. 1876, p. 460; and such indictment is not rendered bad by averring the kind of games played and stating the names of the persons by whom such games were played. *State v. Pancake, 15*
4. *Renting Property for Gaming Purposes. — Evidence.*—To sustain a prosecution, under section 20 of the act defining misdemeanors, etc., 2 R. S. 1876, p. 460, the State must show, by sufficient evidence, either direct or circumstantial, that the accused rented the property to be used for the purpose of gaming. *Rodifer v. State, 21*
5. *Prosecution by Affidavit and Information.*—In a prosecution by affidavit and information, the affidavit must state that the defendant is in custody on the charge preferred against him, and that the grand jury of the county is not in session. *State v. Henderson, 23*
6. *Gaming Table. — Indictment. — Evidence. — Variance.*—Under an indictment charging the defendant with keeping and exhibiting a pool table for the purposes of gaming, evidence that he kept a billiard table, and not a pool table, is a fatal variance. *Sumner v. State, 52*
7. *Same. — Statute Construed. — Evidence.*—The clause, “for the purpose of wagering,” in section 74, 2 R. S. 1876, p. 480, making it a misdemeanor for one to keep a gaming table, means “for the purpose of” (himself) “wagering,” and not for the purpose of permitting others to wager thereon; and where, in a prosecution under said section, the evidence fails to show that the defendant kept or exhibited the table for the purpose of wagering thereon, or that he ever did wager thereon, though he permitted others to do so, it is insufficient to warrant a conviction. *Ib.*
8. *Same.*—A criminal statute will not be extended by construction beyond what its terms fairly import. *Ib.*
9. *Instruction. — Reasonable Doubt.*—An instruction that the jury should be so convinced by the evidence, that as prudent men they would feel safe to act upon such conviction in matters of the highest concern to their own dearest and most important interests under circumstances where there was no compulsion or coercion upon them to act at all, is not an essential departure from the doctrine of reasonable doubt as laid down in *Bradley v. The State, 31 Ind. 492.* *Garfield v. State, 60*

- board of commissioners approving the report, such board has no right to set aside such judgment and appoint reviewers. *Ib.*
10. *Same.—Right to Set Aside Final Judgment.*—The right to set aside final judgments is not an ordinary incident of the jurisdiction of courts of limited statutory jurisdiction. *Ib.*
11. *Record.—Finding.—Petition for Appropriation to Railroad.—Election.—Interpolation of Record.*—The recital in the entry of a board of county commissioners, ordering an election in a township upon a petition therefor to vote aid for the construction of a railroad, "And proof being made that twenty-five of the petitioners are freeholders of Clinton township." is sufficient to show that such board found that the petition was signed by twenty-five freeholders of the particular township of their own county, and the mere fact that such recital was interpolated after the other parts of the entry had been completed does not affect the validity of the entry or the part interpolated. *Goddard v. Stockman, 400*
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14. *Same.—Contesting Validity of Election.—Appeal from Order of Board.—Injunction.*—While the law for contesting elections is not applicable to elections held for the purpose of voting aid for the construction of a railroad, yet the board of county commissioners has the right to go behind the canvass of the vote and inquire into the truth of the return made by the canvassers; and any individual interested may appear before the board and contest the result of the election, and if aggrieved at their decision may appeal to the circuit court, and in this way the validity of the result of such election, as to the legality of the votes cast, may be contested, but not by a suit to enjoin the collection of the tax levied in pursuance thereof. *Ib.*
15. *Same.—Levy of Less than One-half of Donation.—Appeal.*—If, in such case, the one per cent. levied for the current year amounted to less than one-half of the amount of the donation asked, the remedy therefor is by appeal from the order whereby the levy was made. *Ib.*
16. *Same.—Granting Prayer of Petitioners.—Sufficiency of Order.*—The recital in the record of the order of the board of commissioners making such an appropriation, that "it is hereby ordered that a special tax of one per cent. * * be and the same is hereby levied, * * for the purpose of raising one-half of the amount specified in said petition." is a sufficient granting of the prayer of the petition. *Ib.*
17. *Same.—Property Omitted from Taxation Does not Render Tax on Other Property Invalid.*—If, in making the levy for such donation, certain taxable property of the township was omitted from the assessment, the tax upon all other property that has been assessed is not thereby rendered invalid. *Ib.*

COUNTY TREASURER.
See FEES AND SALARIES.

COVERTURE.

See HUSBAND AND WIFE; PARTITION, 3.

CRIMINAL LAW.

1. *Murder.—Evidence. Insufficiency of to Sustain Conviction.*—Where, on the trial of a defendant indicted for murder, the evidence tended to show that the accused was at his home, and that the deceased had followed him there for the purpose of forcing him into a fight, and that in the altercation the deceased, in assaulting the accused, was fatally stabbed by him, such evidence is insufficient to sustain a conviction of the crime of murder in the second degree. *Miller v. State, 1*
2. *Same. — Self-Defence.—Assault.—Justifiable Homicide.*—It is not necessary for one to flee from his home to avoid a fight thrust upon him by an assailant, in order to justify or excuse a homicide resulting therefrom. Being without fault, and in a place where he has a right to be, if violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defence, his assailant is killed, he is justifiable. *Ib.*
3. *Gaming.—Pleading.—Indictment.—Surplusage.*—An indictment, averring that the defendant did “keep his said room and tenement to be used for gaming,” sufficiently charges the offence of keeping a house for gambling, under the first branch of section 20 of the act concerning misdemeanors, 2 R. S. 1876, p. 463; and such indictment is not rendered bad by averring the kind of games played and stating the names of the persons by whom such games were played. *State v. Pancake, 15*
4. *Renting Property for Gaming Purposes.—Evidence.*—To sustain a prosecution, under section 29 of the act defining misdemeanors, etc., 2 R. S. 1876, p. 469, the State must show, by sufficient evidence, either direct or circumstantial, that the accused rented the property to be used for the purpose of gaming. *Rodifer v. State, 21*
5. *Prosecution by Affidavit and Information.*—In a prosecution by affidavit and information, the affidavit must state that the defendant is in custody on the charge preferred against him, and that the grand jury of the county is not in session. *State v. Henderson, 23*
6. *Gaming Table.—Indictment.—Evidence.—Variance.*—Under an indictment charging the defendant with keeping and exhibiting a pool table for the purposes of gaming, evidence that he kept a billiard table, and not a pool table, is a fatal variance. *Sumner v. State, 52*
7. *Same.—Statute Construed.—Evidence.*—The clause, “for the purpose of wagering,” in section 74, 2 R. S. 1876, p. 480, making it a misdemeanor for one to keep a gaming table, means “for the purpose of” (himself) “wagering,” and not for the purpose of permitting others to wager thereon; and where, in a prosecution under said section, the evidence fails to show that the defendant kept or exhibited the table for the purpose of wagering thereon, or that he ever did wager thereon, though he permitted others to do so, it is insufficient to warrant a conviction. *Ib.*
8. *Same.*—A criminal statute will not be extended by construction beyond what its terms fairly import. *Ib.*
9. *Instruction.—Reasonable Doubt.*—An instruction that the jury should be so convinced by the evidence, that as prudent men they would feel safe to act upon such conviction in matters of the highest concern to their own dearest and most important interests under circumstances where there was no compulsion or coercion upon them to act at all, is not an essential departure from the doctrine of reasonable doubt as laid down in *Bradley v. The State, 31 Ind. 492.* *Garfield v. State, 60*

10. *Same.—Teachings of Experience.*—An instruction, that "It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it," etc., does not contain a proposition of law, but only declarations of supposed facts, which must be left to the jury, in the light of their experience. *Ib.*
11. *Same.—Harmless Error.*—It is no cause for complaint that such an instruction has been refused when the grounds for distrusting and doubting testimony have been fully and clearly stated in other instructions given at the defendant's request. *Ib.*
12. *Same.—Doubts not Equivalent.*—It was not error to refuse to instruct the jury that they must acquit the defendant, if they had a reasonable doubt as to whether he left B. on the 1st of December, and was present at the house of S. B. on the morning of the 2d of December, 1879. The court could not say as matter of law, that a doubt whether the defendant left B. on December 1st was equivalent to a doubt whether he was present at the time and place of the offence. *Ib.*
13. *Same.—Larceny.—Bank Bills and Money.—Personal Goods.*—Under section 24, 2 R. S. 1876, p. 435, the phrase "goods and chattels," in an indictment, means "personal goods, of which larceny may be committed," and includes "bank bills and money." *Ib.*
14. *Indictment.—Title.—Variance.—Repugnancy.*—Under the sixth clause of section 61, 2 R. S. 1876, p. 386, an indictment is not bad for repugnance where the defendant is truly named in the body of the indictment, but another person is named in the title. *State v. Boss, 80*
15. *Crime Committed by Convict while in Penitentiary.—Jurisdiction.—Sentence Adjudged.*—Where a prisoner, while undergoing imprisonment in the penitentiary for a term of years, commits a criminal offence, the circuit court of the county where such offence is committed has jurisdiction to try him therefor, and may adjudge that he be imprisoned for a term extending beyond the term for which he was already sentenced, or for life, or may adjudge that he suffer death. And, where the term of imprisonment adjudged is for life, it will commence on the day of conviction and sentence, and run concurrently with the term of the previous sentence. *Kennedy v. Howard, 87*
16. *Same.—Term of Imprisonment.—Several Convictions.*—The courts of this State have no authority to adjudge, on several convictions, that one term of imprisonment shall commence at the expiration of another. *Ib.*
17. *Verdict.—Judgment.*—Where, on a conviction for grand larceny, the verdict of the jury contains no express disqualification of the defendant for holding office, and the judgment follows the verdict, the defendant not having been shown to have suffered any injury thereby, such verdict is not void, and no error was committed in rendering judgment thereon. *Wilson v. The State, 28 Ind. 393, distinguished. Shafer v. State, 90*
18. *Same.—Indictment.—Practice.—Evidence.*—An objection to an indictment, that the property charged to have been stolen is inaccurately described, is no cause for quashing the indictment, where the objection is not applicable to all the property named therein. The proper way to present such objection is to object to the admission of any evidence concerning the property inaccurately described. *Ib.*
19. *Affidavit and Information.—Constitutional Law.*—The act approved March 29th, 1879, Acts 1879, p. 143, "in relation to prosecutions of felonies by affidavit and information in certain cases," is general and of uniform operation throughout the State, and is constitutional. *Heanley v. State, 99*
20. *Same.—Defendant's Personal Right.—Jurisdiction.*—The provision in section 2, that "any person charged with a felony shall have the

right to demand that he be prosecuted by affidavit and information without delay," gives a personal right which he may exercise if he elect so to do, but the court's jurisdiction does not depend upon his exercise or non-exercise thereof. *Ib.*

21. *Indictment.—Exception in Statute.*—Exceptions to offences created by statute, not contained in the enacting clause or in the definition of the offences, but in a subsequent clause or statute, are matters of defence, and need not be negatived, either in the indictment or by the evidence. *State v. Maddox, 105.*
22. *Same.—Drawing Dangerous Weapon.*—It is not necessary, in an indictment under the act of March 13th, 1875, 2 R. S. 1876, p. 459, for drawing a dangerous weapon, to negative the exception contained in the proviso to such act. *Ib.*
23. *Felony.—Affidavit and Information.—Statute Construed.*—In a prosecution for felony, under section 1 of the act of March 29th, 1879, Acts 1879, p. 143, the averments in the information, "that an indictment was found by the grand jury and quashed, and that said grand jury is not now in session," are insufficient, under either the first or second clause of said section. *Iter v. State, 188*
24. *Assault and Battery.—Evidence.—Admission.—Res Gestæ.—Declarations Against Interest.*—In a prosecution for assault and battery it is competent for the State to prove declarations made by the accused, whether made at the time of the commission of the offence or not, or whether the injured person was or was not present when they were made. Declarations against interest are admissible in evidence, although not a part of the *res gestæ*. *Allen v. State, 216*
25. *Affidavit and Information.—Constitutional Law.—Case Overruled.*—The act of March 29th, 1879, Acts 1879, p. 143, in relation to the prosecution of felonies by affidavit and information, is constitutional and valid, and whatever is in conflict with this conclusion in *Reed v. The State*, 12 Ind. 641, is overruled. *Jones v. State, 249*
26. *Same.—Jurisdictional Facts put in Issue by Plea of Not Guilty.—Evidence.*—The jurisdictional facts necessary to give the court authority to try felonies by affidavit and information, under said act of March 29th, are put in issue by a plea of not guilty, and such fact must be established by competent and sufficient evidence. *Ib.*
27. *Same.—Evidence of Jurisdiction.*—As to the sufficiency of the evidence of jurisdictional facts to sustain the verdict in such prosecution, see opinion. *Ib.*
28. *Forgery.—Evidence.—Indictment.—Variance.*—In a prosecution for the forgery of a national bank note, the copy of the note set out in the indictment contained the name "L. W. Chittenden, Register of the Treasury," while in the note offered in evidence the name appeared to be "L. E. Chittenden, Register of the Treasury."
Held, that such variance was material and fatal, and the note inadmissible in evidence. *State v. Pease, 263*
29. *Felony.—Practice.—Affidavit and Information.—Constitutional Law.*—The act in relation to prosecutions of felonies by affidavit and information in certain cases, approved March 29th, 1879, Acts 1879, p. 143, is constitutional. *Sturm v. State, 278*
30. *Same.—Sufficiency of Affidavit.*—The averment, in an affidavit and information, "and affiant further says that there is no grand jury in session at this term of said Warren Circuit Court, and that the defendant is now in the jail of said county on said charge," is sufficient under the first clause of section 1 of said act. *Ib.*
31. *Same.—Information.—"Affiant" Instead of "Prosecuting Attorney."—Jurisdiction.*—An objection that the word "affiant" was used, instead of the words "Prosecuting Attorney," in an information, can not be

- raised for the first time on an assignment of error questioning the jurisdiction of the court. *Ib.*
32. *Same.—Practice.—New Trial.*—In criminal cases, the application for a new trial must be made before judgment. *Ib.*
33. *Same.—Prayer of Information.*—The prayer of an information, "that a warrant be issued for the said defendant in this behalf, that he may answer in the premises." can not be allowed to control or modify the direct charge or charges contained in the body thereof. *Ib.*
34. *Same.—Refusal of Continuance.—New Trial.—Assignment of Error.—Supreme Court.*—The improper refusal of a continuance is not one of the causes for which a new trial of a criminal case can be granted, but it must be the subject of an independent assignment of error in the Supreme Court. *Ib.*
35. *Same.—Practice.—Supreme Court.*—The settled practice of requiring a specific assignment of all errors relied upon in the Supreme Court in criminal cases, the same as in civil, will not now be departed from. *Ib.*
36. *Burglary.—Indictment.—Corporation.—Railroad Company.—Presumption.*—Where an indictment for burglary charges that the offence was committed by a burglarious entrance into the office of a railroad company, therein designated, it is not necessary to also aver that such company was a corporation, partnership or stock company. In such case corporate existence will be implied. *Norton v. State, 337*
37. *Same.—Evidence.—De Facto Corporation.*—It is not error in such case to permit a witness to state that such railroad company was a corporation; it is sufficient to prove that such company was known and acting as a corporation. *Ib.*
38. *Forfeiture of Bail Deposit.—Prosecuting Attorney.—Docket Fees.—Percentage on Forfeited Recognizance.*—A prosecuting attorney is entitled to, and should be allowed, the same docket fee upon the forfeiture of money deposited as bail, as upon a forfeited recognizance, such fee to be paid out of such forfeited money; but he is not entitled to a percentage thereon, unless he has prosecuted to final judgment a suit for the recovery of the forfeited money, and then only to a percentage on the amount collected. *State v. Barron, 374*
39. *Same.—Fees of Clerk and Justice of the Peace.*—A court has no authority to direct the payment of the clerk's fees, or the costs of the justice of the peace by whom a defendant was committed, out of the forfeited money deposited by him as bail. *Ib.*
40. *Appeal, How and When Taken.—Filing Transcript.*—An appeal to the Supreme Court, in a criminal cause, is considered as taken on the day on which notice thereof is fully served on the proper officers or party, and the transcript of the record must be filed in the Supreme Court within thirty days thereafter, or the appeal will be dismissed. *Price v. State, 553*
41. *Sale of Intoxicating Liquor on Day of Municipal Election.—Statute Construed.*—An election, held by a city under section 1 of the act of March 23th, 1879, Acts 1879, p. 88, authorizing cities to construct water-works, is a municipal election, within the meaning of section 1 of the act of March 5th, 1877, Acts 1877, Reg. Sess., p. 92, prohibiting the sale of intoxicating liquors on the day of a municipal election. *State v. Kidd, 554*
42. *Assault and Battery.—Indictment.—Sufficiency of.*—In a prosecution for assault and battery, an indictment charged that the defendant "did unlawfully commit an assault and battery upon the person of one M. S., by then and there, in a rude, insolent and angry manner, touching, striking, beating," etc., the said M. S.
Held, that it was insufficient for want of an averment that the touching, etc., was unlawful. *State v. Smith, 557*

43. *Same.*—It is not necessary to use the word “unlawful” in describing the touching, etc., if another term of the same import and meaning be employed. *Ib.*
44. *Pleading.—Indictment.—Perjury.—Schedule of Property Returned for Taxation.*—An indictment for perjury in taking an oath to a schedule of property returned for taxation, under section 49 of the act of December 21st. 1872, 1 R. S. 1876, p. 81, must set forth an exact copy of the oath administered to the defendant, and if it purport to set forth only the substance and effect thereof, it is not sufficient on motion to quash. *State v. Blackstone, 592*
45. *Same.—Query.*—Ought not the indictment also to set forth by exact copy so much of the schedule as is relevant to the alleged perjury? *Ib.*
46. *Practice.—Instructions.—Venue.*—An instruction, in a trial of a criminal case, is not fatally defective because it does not inform the jury in terms that they must be satisfied that the alleged crime was committed in the county named in the indictment. The phrases “as charged” and “as alleged,” used in such instruction, inform the jury that they must be satisfied that the crime was committed at the place charged in the indictment. *Dyer v. State, 594*
47. *Same.—Absence of Evidence.—Presumption.*—Without the evidence in the record, the Supreme Court can not judge of the applicability of instructions, or know that they were not pertinent to the evidence, and in such condition of the record will assume that the trial court did right. Error will not be presumed, but must be affirmatively shown. *Ib.*
48. *Same.—Purity of Reagents.—Chemical Analysis.—Question for Jury.*—When certain reagents are shown to have been employed in a chemical analysis to be used in evidence, the question of the purity or impurity of such reagents is one for the jury, and a presumption of their impurity can not be indulged in favor of the innocence of the defendant. *Ib.*
49. *Indictment.*—As a general rule, it is sufficient to charge an offence in the language of the statute by which the offence is defined. *Payne v. State, 203*

CROSS COMPLAINT.

See MORTGAGE, 10; PLEADING, 2, 4, 17; PRACTICE, 7.

CROSS EXAMINATION.

See EVIDENCE, 6.

DAMAGES.

See MORTGAGE, 6; NEGLIGENCE, 1, 7, 15, 16; PLEADING, 24.

DAMAGES. MEASURE OF.

See APPEAL BOND, 2; CITIES AND TOWNS, 13.

DEBT.

See ACTION ON ASSIGNED DEBT.

DECEDENTS' ESTATES.

See ALIEN, 2; EVIDENCE, 11; REAL ESTATE, 5; WILL, 5.

1. *Appeals by Executors and Administrators.—Statute Construed.*—The provisions of sections 189 and 190 of “An act providing for the settlement of decedents’ estates,” etc., 2 R. S. 1876, p. 557, have no application to, and do not govern, appeals in suits not prosecuted under that act, and which are expressly authorized by sections 4 and 21 of the code. *Rusk, Adm’r, v. Gray, 231*
2. *Supreme Court.—Appeal.—Motion to Dismiss.—Practice.—Waiver.*—A motion to dismiss an appeal under sections 189 and 190, 2 R. S. 1876, p. 557, because no bond was filed as required, comes too late when made two years after the case had been submitted by agreement,

and briefs upon the merits filed by each party, and must be considered as waived. *West v. Carvins*, 265

3. *Guardian.—Final Settlement.—Collateral Attack.*—The final settlement of a guardian or administrator can be set aside or opened up only by a direct proceeding for that purpose. It can not be attacked by a suit on the bond or by a suit against the guardian or administrator personally or in any other collateral manner. *Peacocke v. Leffler*, 327
4. *Legatee.—Action for Money Advanced to Executor to Make Settlement.—Fraud.—Complaint.*—Where, in an action by the sole legatee of an estate against the executor thereof, after his final settlement, to recover money advanced to such executor, to enable him to make a speedy settlement of the estate, the complaint avers that the executor charged himself with the sum so obtained, and applied it in the settlement of the estate, the additional averment therein, that he procured such money from the legatee by false representations, is insufficient to show actionable fraud on the part of such executor. *Ib.*
5. *Attachment of Administrator.—Practice.—Pleading.*—A right to a trial by jury, "in all cases where there is an issue of fact," under section 188, 2 R. S. 1876, p. 556, implies the right in an administrator to put a case against him, under section 22 or section 161 of the act concerning the settlement of decedents' estates, in shape for trial by special pleas, or by answer in denial, tendering or forming issues of fact to be tried as such. *Phelps v. Martin*, 339
6. *Same.*—Section 161, 2 R. S. 1876, p. 549, strictly construed, does not apply to the case of one who has been removed from his trust and is no longer an executor or administrator, but may perhaps be construed in connection with section 30, 2 R. S. 1876, p. 504. *Ib.*
7. *Same.—Answer of Accomplished Wrong.*—An answer, showing that whatever wrong had been done was fully accomplished before the defendant's removal from his trust, that since his removal he had not had the balance due the estate in his possession or control, has not concealed it, and has no power to restore it, nor means with which to secure its restoration, constitutes a good and complete defence against procedure under section 161, 2 R. S. 1876, p. 549. *Ib.*
8. *Same.—Intent of Law.*—The object of the law under consideration was to effect a discovery and a restoration, but not to punish for what could not be compensated. *Ib.*
9. *Suits by Administrators.—Appeal.—Practice.—Supreme Court.—Cases Distinguished.*—Appeals to the Supreme Court in suits by executors and administrators, authorized by sections 4 and 21 of the civil code, are regulated by, and must conform to, the requirements of the code on the subject of appeals, and are not governed by sections 189 and 190 of the act providing for the settlement of decedents' estates. *See-ard v. Clark*, 67 Ind. 289, and *Bell v. Mousset*, 71 Ind. 347, distinguished. *Willson v. Binford*, 424

DECLARATIONS.

See CRIMINAL LAW, 24.

DEED.

See CONVEYANCE; GUARDIAN AND WARD, 1; REAL ESTATE, ACTION TO RECOVER, 2; SCHOOL LAW; TAXES.

DEFAULT.

See JUDGMENT, 2, 3; REAL ESTATE, ACTION TO RECOVER, 3.

DELIVERY.

See CONSIGNMENT.

DEMAND.

See CHATTEL MORTGAGE, 2; CONTRACT, 4; LANDLORD AND TENANT, 2; PARTNERSHIP.

DEMURRER.

See CHATTEL MORTGAGE, 3; CITIES AND TOWNS, 7, 17; CONSTABLE, 1; COSTS; JURISDICTION, 3; MORTGAGE, 10, PARTITION, 5; PLEADING, 3, 8, 10, 14, 15, 17; PRACTICE, 7, 19; REAL ESTATE, ACTION TO RECOVER, 7, 8; SUPREME COURT, 37.

DESCENT.

See PARTITION, 2, 3; REAL ESTATE, 5; TRUSTS, 2 to 4; WILL, 1 to 3.

DESCRIPTIO PERSONÆ.

See PLEADING, 1.

DESCRIPTION.

See ACTION ON ASSIGNED DEBT, 2, 3; CHATTEL MORTGAGE, 1, 3 to 5; DITCHES AND DRAINS, 1; REAL ESTATE, ACTION TO RECOVER, 2.

DESTITUTION OF FAMILY.

See NEGLIGENCE, 11.

DEVISEE.

See JUDGMENT, 8, MORTGAGE, 11; WILL, 5, 6.

DILIGENCE.

See CITIES AND TOWNS, 12.

DILIGENT SEARCH.

See CONSTABLE, 1, 2.

DISAFFIRMANCE.

See CONVEYANCE.

DISMISSAL.

See DECEDENTS' ESTATES, 2.

Announcement of Finding.—How Made.—Statute Construed.—An entry by the judge, on his docket, of the finding in a cause, is not an announcement of the finding, within the meaning of the first clause of section 363 of the code, 2 R. S. 1876, p. 184. Such announcement, to bar the plaintiff's right to dismiss his action, must be made orally, in open court, or by means of a public record which will bring the ruling to the knowledge of the parties. *Cohn v. Rumely, 120*

DITCHES AND DRAINS.

1. *Act of 1875.—Sufficiency of Description.*—The act of March 9th, 1875, 1 R. S. 1876, p. 428, requires a petition to establish a ditch, to give a general description of the proposed starting point, route and terminus. The word "about," where there are other words limiting and restraining its meaning, does not materially impair the certainty of the description. *Corey v. Swagger, 211*
2. *Same.—Petition.—Statement of Necessity for Ditch.*—Where the petition avers that the construction of the ditch would be "conducive to the public health, convenience and welfare," and would be "of public benefit and utility," the necessity may fairly be inferred. As used in this statute, the word "necessity" does not mean that which is absolutely requisite, but that which is essentially requisite. *Ib.*
3. *Same.—Practice on Appeal.—Harmless Error.*—On appeal to the circuit court from an order of the board of commissioners establishing a ditch, the cause stands for trial *de novo*, and overruling a motion to set aside the report of the reviewers, if erroneous, did appellants no harm. *Ib.*
4. *Same.—Evidence.—Report of Reviewers.*—The report of the reviewers is not competent evidence on the trial in the circuit court. *Ib.*
5. *Notice.*—Under section 2 of the act of March 9th, 1875, p. 97, notice of the pendency of a petition to establish a ditch must be published for four consecutive weeks, and notice published for one day less than that time is irregular and voidable. *Muncey v. Joest, 409*

6. *Same.—Finding of Commissioners.—Collateral Attack.*—Whether there was or was not sufficient notice, is a jurisdictional question to be determined by the commissioners, and their finding can not be collaterally attacked, unless the record affirmatively shows that no notice whatever was given. *Ib.*
7. *Same.—Injunction.—Estoppel.*—One who stands by and sees the construction of a ditch without objecting, is estopped from afterward suing out an injunction on the ground that proper notice of the letting of the contract was not given. *Ib.*
8. *Same.—Breach of Contract.*—The mere fact that a contract has not been performed according to its terms is not ground for an injunction. *Ib.*
9. *Same.—Bond of Contractor.—Surety.*—An engineer of a ditch may become surety on the bond of the contractor, as such surety does not thereby become interested in the contract within the meaning of section 12 of the act, *supra*. *Ib.*

DOCKET FEES.

See CRIMINAL LAW, 38.

DOWER.

See CONVEYANCE, 4.

DRAINING LAW.

See DITCHES AND DRAINS.

DRAWING WEAPON.

See CRIMINAL LAW, 21, 22.

ELECTION.

See CITIES AND TOWNS, 24, 25; COUNTY COMMISSIONERS, 11 to 14; CRIMINAL LAW, 41.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 2 to 6.

ENDORSEMENT.

See BILL OF EXCHANGE.

ENDORSEMENT ON COMPLAINT FIXING RETURN DAY OF SUMMONS.

See PRACTICE, 17.

ENTRIES.

See EVIDENCE, 2.

ERRONEOUS JUDGMENT.

See FRAUDULENT CONVEYANCE.

ESCHEAT.

See ALIEN, 1.

ESTOPPEL.

See ALIEN, 5, 6, 8; DITCHES AND DRAINS, 7; PARTITION, 2; WILL, 6.

1. *Estoppel in Pais and by Deed.*—A woman, having a child by a former marriage, and holding real estate in virtue of that marriage, during a subsequent coverture, attempted to convey the land in fee simple, for a valuable consideration, by deed with full covenants, in which her husband joined. The child, being fully informed of her rights, consented to the conveyance, and upon reaching full age, the mother still being alive, she executed to the purchaser her own deed of quitclaim, without covenants, for the purpose of signifying her consent to her mother's conveyance, and for the purpose of conveying all her present or expectant estate in the land, and of releasing it from any claim or demand by her; and, after her mother's death, she received from her step-father the amount of the purchase-money which had

not been expended by her mother, and which she accepted with knowledge of the source from which it was derived.

Held, that such child was not estopped to set up her title by descent from her mother and to maintain an action for possession of the land.

Avery v. Atkins, 283

2. *Necessary Element.—Knowledge of Legal Rights.*—A paragraph of answer charging in effect only an agreement of senior and junior incumbrancers, that they would not bid against each other at their respective sales, without alleging that any facts were known to the plaintiff that were not also known to the defendant, discloses no element of an estoppel by conduct against a plaintiff, to maintain an action for redemption. One party is as much bound to a knowledge of their respective legal rights as the other. *Hosford v. Johnson*, 479

EVIDENCE.

See ALIEN, 5; BILL OF EXCHANGE; CHATTEL MORTGAGE, 3, 5; CITIES AND TOWNS, 13, 19; CONTRACT, 2; CRIMINAL LAW, 1, 4, 6, 7, 18, 24, 26 to 28, 37, 47; DITCHES AND DRAINS, 4; GUARDIAN AND WARD, 1; JUDGMENT, 1; LANDLORD AND TENANT, 1, LIQUOR LAW, 5; NEGLIGENCE, 8, 11 to 14; PLEADING, 7, 12, 13; PRACTICE, 11, 12, 20, 21, 25; PRESUMPTION, 2; REAL ESTATE, 13; REAL ESTATE, ACTION TO RECOVER, 3; SUPREME COURT, 4, 18, 19, 24, 25, 36, 45 to 47; TAXES; WILL, 3, 4.

1. *Services of Assistant.*—Services rendered by an assistant may be proved as part of the claim sued on. *The Board, etc., v. Brewington*, 7
2. *Poor-Books.—Entries.*—Entries in the poor-books of a township are admissible in evidence, although made up from memoranda made at the time of the transaction. *Ib.*
3. *Testimony of Trustees.*—Parol testimony of township trustees is competent evidence to prove an employment to treat paupers. *Ib.*
4. *Instructions.—Preponderance of Evidence.*—An erroneous definition of the preponderance of evidence, followed by proper qualifying words, will not tend to mislead the jury. *Ib.*
5. *Value of Services.*—It is not error to instruct the jury that if they find for the plaintiff they should “ascertain from the evidence of the witnesses the value of the services by him rendered, and allow him the value of the services for which he is entitled to recover, as ascertained by the evidence of the witnesses who have testified as to the value of such services. *Ib.*
6. *Cross-Examination.*—The cross-examination must be confined to the subject-matter of the original examination. *Johnson v. Wiley*, 233
7. *Same.—Witness.—Impeachment.—Collateral Matter.*—A collateral matter can not be inquired into for the purpose of impeaching a witness. *Ib.*
8. *Same.—Motives.—Contradictory Statements.*—It is proper to show the motives or feelings of a witness, and it is competent, for the purpose of impeachment, to prove that he has, at a specified time and place, made statements showing that his impartiality is affected by motives arising from friendship, affection, fear or interest. *Ib.*
9. *Former Trial.*—In a second action and trial, it is not competent for a witness to testify in a general way on what theory the suit was first prosecuted, and upon what intimations of the court the case was dismissed. *West v. Cavins*, 365
10. *Same.—Admissions of Attorney.—Query.*—Can an attorney, in the absence of his client, make an admission of fact which would be binding on the client, except for the purposes of the pending case? *Ib.*
11. *Same.*—In an action against a decedent’s estate on a note given by the testator in his lifetime, testimony as to the fact and time of his

sending a sum of money to the payee is competent and relevant, it being proper to be considered in determining whether the note was given as compensation for services and acts of kindness to the deceased. *Id.*

12. *Witness.—Value of Services.*—It is competent for a witness to state the value of another's services, where he has knowledge of the matter in controversy, and is acquainted with the value of services such as those rendered. *Bowen v. Bowen, 470*

EXCEPTION.

See PRACTICE, 1, 5, 6; SUPREME COURT, 3.

EXECUTION.

See ACTION ON ASSIGNED DEBT, 1, 4; CONSTABLE; JUDGMENT, 4, 5; REPLEVIN BAIL, 2, 3, 9, 10.

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES.

EXHIBIT.

See PLEADING, 22.

EXTENSION OF TIME.

See PRACTICE, 21.

FEEES.

See CRIMINAL LAW, 39.

FEEES AND SALARIES.

See CITIES AND TOWNS, 3 to 7; PROSECUTING ATTORNEY, 3.

County Treasurer.—Commission for Collecting Delinquent Taxes.—Under section 5 of the fee and salary act of March 8th, 1873, Acts 1873, p. 124, and section 155 of the assessment act of 1872, 1 R. S. 1876, p. 111, a county treasurer was entitled to charge and receive a commission of five per cent. on all delinquent taxes collected by him during the current year, paid voluntarily and without levy, and without reference to the particular time of the year at which such taxes may have been collected. *The Board, etc., v. Gregory, 218*

FENCE.

See CITIES AND TOWNS, 15, 20, 21, 22; RAILROAD, 1.

FILING TRANSCRIPT.

See CRIMINAL LAW, 40.

FINDING.

See CONTRACT, 2; COUNTY COMMISSIONERS, 11; DISMISSAL; DITCHES AND DRAINS, 6; PLEADING, 12; PRACTICE, 13; SUPREME COURT, 47.

FORGERY.

See CRIMINAL LAW, 28.

FRAUD.

See DECEDENTS' ESTATES, 4; PROMISSORY NOTE, 4.

FRAUDULENT CONVEYANCE.

Action to Set Aside.—Grantor and Grantee.—Practice.—Judgment.—In an action to set aside an alleged fraudulent conveyance, against the grantor and grantee therein, by a judgment creditor of the grantor, a general verdict was returned against both defendants. On motion, a new trial was awarded the grantor and denied the grantee, and, without judgment, the case was continued. At the subsequent term, the cause as to the grantor was tried by the court, and a finding and judgment rendered in his favor. Over the objection of the grantee, the court rendered a judgment against him, upon the verdict of the jury, setting aside such conveyance as fraudulent.

Held, that such judgment was erroneous.

Love v. Geyer, 12

GAMING.

See **CRIMINAL LAW**, 3, 4, 6, 7.

GIFTS INTER VIVOS AND CAUSA MORTIS.

See **PROMISSORY NOTE**, 2.

GRAVEL ROAD.

See **COUNTY COMMISSIONERS**, 1 to 4; **PLEADING**, 11.

GUARDIAN AND WARD.

See **CONTRACT**, 2; **DECEDENTS' ESTATES**, 3; **PLEADING**, 5.

1. *Sale of Real Estate.—Deed by Commissioner.—Evidence of Confirmation of Sale.*—A deed, made by a commissioner appointed by the court for that purpose, upon the sale of a ward's real estate, under a petition therefor by his guardian, is proof sufficient, in the absence of any evidence to the contrary, that such sale was reported to and approved by the court. *Edwards v. Powell*, 294
2. *Custody.—Education.—Support.—When Duty to Keep Ward Employed.*—A guardian is entitled to the custody of his wards, and it is his duty to provide for their education; and when of limited fortune, and able to earn their support, it is his duty to keep them so employed rather than to allow them to remain in idleness or expend their limited patrimony. *Brown v. Yaryan*, 305

HARMLESS ERROR.

See **CRIMINAL LAW**, 11; **DITCHES AND DRAINS**, 3; **PLEADING**, 10, 23; **PRACTICE**, 4, 7; **RAILROAD**, 3; **SUPREME COURT**, 32, 37.

HARMLESS RULING.

See **CITIES AND TOWNS**, 18.

HEIRS.

See **ALIEN**, 2; **CONVEYANCE**, 4; **JUDGMENT**, 8; **MORTGAGE**, 11; **PRACTICE**, 25.

HIGHWAY.

See **COUNTY COMMISSIONERS**, 1 to 10; **LIQUOR LAW**, 2; **RAILROAD**, 1.

HUSBAND AND WIFE.

See **TRUSTS**.

1. *Coverture.*—A married woman has a right to recover for money paid by her at another's request, and her coverture is no defence to an action by her seeking such recovery. *Farman v. Chamberlain*, 82
2. *Wife's Services.*—A husband can make a valid gift of his wife's services to her, for which she can maintain an action. *Ib.*
3. *Same.—When Wife Competent Witness.*—Where the wife is the owner in her own right of the cause of action, her husband is only a nominal plaintiff, and she is a competent witness under section 1 of the act of March 11th, 1867. 2 R. S. 1876, p. 132. *Ib.*

IDENTIFICATION.

See **CHATTEL MORTGAGE**, 4.

IDENTITY.

See **PLEADING**, 6.

IMPEACHMENT.

See **EVIDENCE**, 7.

INDEMNITY.

See **REAL ESTATE**, 6.

INDICTMENT.

See **CRIMINAL LAW**, 3, 6, 14, 18, 21, 28, 36, 42 to 45, 49; **LIQUOR LAW**, 1, 4, 7.

INDORSEMENT.

See PLEADING, 21.

INFANCY.

1. *Contract.—Ratification.*—Where a minor, in conjunction with a person of full age, retains possession of leased premises, under a contract therefor, ten months after attaining his majority, he thereby ratifies such contract. *McClure v. McClure, 108*
2. *Same.—Wrongful Detention.*—Infancy is not a defence to an action for the wrongful detention of property. *Id.*

INFORMATION.

See ALIEN, 1, 2; PROSECUTING ATTORNEY, 2.

INJUNCTION.

See COUNTY COMMISSIONERS, 14; DITCHES AND DRAINS, 7; LANDLORD AND TENANT, 3.

INNOCENT PURCHASER.

See REAL ESTATE, 4.

INSOLVENCY.

See CONSTABLE, 3, 4; PLEADING, 26.

INSTRUCTION TO JURY.

See CITIES AND TOWNS, 14, 18; CONSTABLE, 4; CRIMINAL LAW, 9 to 12, 46; EVIDENCE, 4, 5; NEGLIGENCE, 9, 10, 15; PRESUMPTION, 2; RAILROAD, 2, 3; SUPREME COURT, 1, 16, 26, 28, 43, 44, 46.

INSURANCE PREMIUMS.

See MORTGAGE, 7.

INTEREST.

See MORTGAGE, 2, 3; PRACTICE, 12.

INTERROGATORIES TO JURIES.

See PRACTICE, 18, 24; SUPREME COURT, 31.

1. *Conflict of Answers with General Verdict.—Practice.*—Where there is a direct and irreconcilable conflict between the general verdict and the answers to interrogatories, the latter will prevail against the former. *McClure v. McClure, 108*
2. *Same.—When Single Answer to Interrogatories will Prevail Against General Verdict.*—Where interrogatories cover the whole case, and, taken together, sustain the general verdict, parties can not single out one of a series of answers and ask judgment upon that alone as against the general verdict, unless such answer is upon a vital point and distinct from and independent of other answers, and so in conflict with the general verdict as not to be reconcilable with it upon any reasonable hypothesis consistent with the issues. *Id.*

INTOXICATING LIQUOR.

See CRIMINAL LAW, 41; LIQUOR LAW, 1.

JOINT OBLIGORS.*Judgment Against One.*—As a general rule a judgment against one of several joint obligors releases the others. *Robinson v. Snyder, 110***JUDGMENT.**

See ATTACHMENT, 2, 6; COUNTY COMMISSIONERS, 7 to 10; CRIMINAL LAW, 15, 16, 17; FRAUDULENT CONVEYANCE; JOINT OBLIGORS; JURISDICTION, 1, 2; PARTITION, 2; REAL ESTATE, 4; REPLEVIN BAIL, 2, 4, 5, 7, 10, 12; SUPREME COURT, 12, 42.

1. *Transcript.—Admission.—Evidence.*—The admission on the trial of a cause, that a transcript of a judgment offered in evidence is valid, is not an admission that the judgment of which it is a copy is also valid. *Lockwood v. Dills, 56*

2. *Default.—Record of Service and Return.—Appeal.*—Judgment by default can not be affirmed on appeal, unless the record contains a transcript of the summons, and the return of due service thereof; an express recital in the record, that there was proof of the issue and due service of process, is not sufficient. *Fee v. State, ex rel., 66*
3. *Process and Service.—Record.—Default.*—It is necessary to the validity of a judgment by default against a defendant in an action, that the record should affirmatively show that process had been duly served the required length of time before the default was taken. *Eltzroth v. Voris, 459*
4. *Payment by Replevin Bail.—Execution.*—When a judgment has been paid by the replevin bail, it remains in force for his benefit, and may be proceeded upon to execution for his use. *Jones v. Rhoads, 510*
5. *Same.—Order of Court.*—Where a controversy as to the facts upon which the right of a replevin bail to execution rests is likely to arise, there is a manifest propriety in obtaining an order for execution before proceeding to enforce the judgment he has replevied, for his own use; but there is no statutory provision requiring such an order to be first obtained. *Ib.*
6. *Same.—Equitable Interest.—Priority.*—A previously acquired equitable interest in a tract of land has priority over the general lien resulting from a judgment against the holder of the legal title. *Ib.*
7. *Same.—Replevin Bail.—Rights not Abridged.*—Where a replevin bail is not a party to a proceeding in which the lien of the judgment is declared to be junior to the lien of a mortgage sued on, his remedial rights are in no manner abridged by the foreclosure proceedings. *Ib.*
8. *Same.—Priority of Lien.—Devisee.—Mortgage to Heirs.—Lien.*—The lien of a judgment against a devisee of lands, so far as it enures to the benefit of his replevin bail, has priority over the lien of a mortgage of the devised lands, given by the devisee to the heirs of the testator in compromise of an action to set the will aside. *Ib.*
9. *Sentence of Court may be Designated by Different Term.*—Generally, a judgment is the decision of a controversy, given by a court of justice, between parties who do not agree, but a judicial sentence may be designated by a different term than judgment. *Cooper v. Metzger, 544*

JUDICIAL DISCRETION.

See PRACTICE, 22, 23.

JUNIOR INCUMBRANCER.

See MORTGAGE, 4, 5, 8.

JURISDICTION.

See COUNTY COMMISSIONERS, 4, 5; CRIMINAL LAW, 13, 20, 26, 27.

1. *Personal Judgment.*—A personal judgment is void, if the court have no jurisdiction of the person. *State, ex rel., v. Ennis, 17*
2. *Same.—Domestic Judgments.—Presumption.*—Where domestic judgments of courts of general jurisdiction are called in question collaterally, jurisdiction of the person will be presumed, in the absence of proof in the record to the contrary. *Ib.*
3. *Same.—Want of Jurisdiction.—Complaint.—Demurrer.—Answer.*—If want of jurisdiction be apparent on the face of a complaint, it will be bad on demurrer; but, when not apparent, it may be shown by answer. *Ib.*
4. *Same.—How Acquired.*—Jurisdiction of the person can be acquired only by service of process, or by appearance, and on appeal it must be affirmatively shown by the record that the process was duly served, or that the defendant appeared. *Ib.*

5. *Waiver.—Supreme Court.*—Where the law denies to a court jurisdiction of the subject-matter of an action, parties can not confer it, even by express consent, and much less waive objection by not questioning its jurisdiction upon their first appearance to the action. Objections to the jurisdiction of the court over the subject-matter of the cause may be made at any time in the progress of a case, or for the first time in the Supreme Court. *Ductor v. Hartman, 221*

JURISDICTIONAL FACT.

See ATTACHMENT, 2; CRIMINAL LAW, 26, 27.

JURY.

See CRIMINAL LAW, 48; DECEDENTS' ESTATES, 5; NEGLIGENCE, 16.

1. *Officer in Charge of.—Presence During Deliberation of Jury Vitiates Verdict.*—Under the statutes of this State, an officer having a jury in charge, either in a civil or criminal case, has no authority to speak to them, except to ask them if they have agreed upon a verdict, unless by order of the court, and he ought not in either case to be allowed to be present with the jury during their deliberations; his presence, even though he does not speak to the jury, and though it does not appear to have caused any injury, is sufficient to vitiate the verdict returned by the jury. *Rickard v. State, 275*
2. *Right to Poll.—Question Asked.—Verdict.*—The right to poll the jury, in civil actions, is expressly conferred by statute, but the inquiry must be restricted to the single question to each juror, "Is this your verdict?" and not "Is this your verdict, and are you still satisfied with it?" *Bowen v. Bowen, 470*

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 39; REAL ESTATE, ACTION TO RECOVER, 1; REPLEVIN BAIL, 2, 8.

JUSTIFIABLE HOMICIDE.

See CRIMINAL LAW, 2.

JUSTIFICATION.

See LIQUOR LAW, 8.

LANDLORD AND TENANT.

See REAL ESTATE, ACTION TO RECOVER, 6.

1. *Notice to Quit.—Evidence.*—In an action to recover the possession of real estate, where the evidence shows a tenancy for a time certain, no notice to quit is required. *McClure v. McClure, 108*
2. *Notice to Quit, When Unnecessary.—Demand.*—Notice to quit is never necessary unless the relation of landlord and tenant subsists; and where one in possession repudiates the relation of tenant to his landlord, or of vendee to his vendor, if he enters under a contract of purchase and sets up a hostile claim of title, no demand of possession or notice to quit is necessary before suit. *Eberwine v. Cook, 377*
3. *Lease.—Mode of Occupation.—Special Use.—Injunction.*—Where the mode of occupation is fixed by a lease, or where the purpose of a lease is expressed therein, or where the intention of the parties to confine the leased premises to a special use, may be fairly implied from the words of the lease, the tenant may be enjoined from converting the property to other purposes; but without such express language, or such reasonable implication, there is no such restriction upon the tenant. *Reed v. Lewis, 433*
4. *Same.—Restriction of Use.—Agreement.*—A written agreement between A. and B. recited that A. had leased to B. "the following real estate, to wit," followed by a description of five acres of land by metes and bounds, concluding, "containing a certain steam saw-mill, dwelling-house," etc., with the privilege of using all the timber on the prem-

ises, but with the restriction that all the valuable timber be used only for mill purposes, or in the improvement of the premises.
Held, that such lease did not restrict the lessee to the use of the land for the purposes of the mill only. *Ib.*

5. *Same.*—*Duration of Lease for Years must be Certain.*—*Fee Simple.*—Leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain, and leases of an uncertain duration are not valid leases for years. *Ib.*

6. *Query.*—Whether a lease to continue until an uncertain contingency does not create an estate in fee in the lessee, determinable upon the happening of the contingency. *Ib.*

LARCENY.

See CRIMINAL LAW, 13, 17, 18.

LEASE.

See LANDLORD AND TENANT, 3 to 6.

LEGAL DISABILITIES.

See REAL ESTATE, 11.

LEGATEE.

See DECEDENTS' ESTATES, 4.

LEVY.

See REPLEVIN BAIL, 2.

LICENSE.

See LIQUOR LAW, 4, 6, 12.

LIEN.

See ATTACHMENT, 3 to 5; JUDGMENT, 6 to 8; REAL ESTATE, 4, 5, 8; VENDOR'S LIEN.

LIFE-ESTATE.

See WILL, 5.

LIQUOR LAW.

See CRIMINAL LAW, 41.

1. *Indictment.*—*Intoxication.*—*Public Place.*—Under section 11 of the act of March 17th, 1875, 1 R. S. 1876, p. 872, prescribing a penalty for intoxication in certain cases, an indictment alleging that the defendant was found intoxicated "in a public street, highway and sidewalk," charges that the offence was committed in a public place.

State v. Moriarty, 103

2. *Same.*—*Highway.*—*Case Overruled.*—A public highway is a public place. *Williams v. The State, 64 Ind. 553, overruled. Ib.*

3. *Same.*—*Street.*—A street is a public highway, and *prima facie* a public street is a public place. *Ib.*

4. *Sale to Minor.*—*License.*—*Indictment.*—In a prosecution for selling intoxicating liquor to a minor, under section 13 of the act regulating the sale of intoxicating liquor, 1 R. S. 1876, p. 872, it is wholly immaterial whether the defendant had or had not a license at the time of such sale, and therefore not necessary to aver in the indictment whether he had a license to sell or not. *Johnson v. State, 197*

5. *Same.*—As to sufficiency of evidence to warrant conviction, see opinion. *Ib.*

6. *Sale to Minor.*—*Quantity Sold.*—*Statute Construed.*—*When Sale not Violation of Law.*—Section 13 of the liquor law of 1875, 1 R. S. 1876, p. 869, prohibits the sale of intoxicating liquor, in any quantity, to a minor, to be drank as a beverage, either on or off the premises of the seller, whether he be licensed to sell or not; but such section,

construed with other provisions of the act, does not prohibit sales to minors for sacramental, medicinal, mechanical or business purposes.

Payne v. State, 203

7. *Same.—Indictment.*—As a general rule, it is sufficient to charge an offence in the language of the statute by which the offence is defined. *Ib.*
8. *Same.—Defence.—Justification.*—Excuses and justifications for selling intoxicating liquor to a minor are matters of defence, and it is not necessary for an indictment to allege that they do not exist. *Ib.*
9. "*Barter and Sell*"—The averment in an indictment for the unlawful sale of liquor, that the defendant did "unlawfully barter and sell" certain intoxicating liquor, for the price of ten cents, imports a sale, and not a barter. *Massey v. State*, 368
10. *Same.—Sale.*—A sale implies the transfer of property for money, though time may be given for payment. *Ib.*
11. *Same.—Sale to Minor.—Insufficiency of Evidence.—Variance.*—On the trial of a defendant indicted for selling intoxicating liquor to a minor, evidence that the minor in payment therefor gave the defendant two pool-checks, worth five cents each, which had been sold by the defendant at five cents each, to be taken up in beer, does not show a sale, and constitutes a material variance. *Ib.*
12. *License.—Town.*—Prior to 1879, incorporated towns, in this State, had no authority to regulate and license the sale of intoxicating liquors. *Carr v. Town of Fowler*, 590; *Meador v. Town of Fowler*, 601

LIMITATION OF ACTION.

See ALIEN, 4; CITIES AND TOWNS, 2.

MARRIAGE.

Valuable Consideration.—Contract.—Married Woman.—Marriage is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of the marriage or any valid antenuptial agreement.

Derry v. Derry, 560

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

See NEGLIGENCE, 2 to 6.

MEASURE OF DAMAGES.

See APPEAL BOND, 2; CITIES AND TOWNS, 13; NEGLIGENCE, 15.

MEMBER OF FAMILY.

See CONTRACT, 2.

MERGER.

See ALIEN, 7.

MISTAKE.

See CONTRACT, 3; REAL ESTATE, ACTION TO RECOVER, 8.

MORTGAGE.

See ATTACHMENT, 1, 5; JUDGMENT, 7, 8; PLEADING, 17; REAL ESTATE, 1; REAL ESTATE, ACTION TO RECOVER, 3, 6; REPLEVIN BAIL, 7, 12; SCHOOL LAW; VENDOR'S LIEN.

1. *Satisfaction.*—To constitute an effective satisfaction of a mortgage, it is sufficient to state by an entry upon the mortgage record, that "this mortgage is fully and completely satisfied."

Richards v. McPherson, 158

2. *Same.—Interest.*—A mortgage dated October 23d, 1875, with provision for interest at ten per cent. from date, bears interest at that rate until maturity only, and afterward at six per cent. *Ib.*

3. *Same.—Excess of Interest.—Reversal.—Remittitur.*—A judgment which includes an excess of interest will be reversed, unless the excess be remitted by the appellee. *Ib.*
4. *Foreclosure.—Senior and Junior Mortgages.*—The rights of a junior incumbrancer are in no wise affected by the foreclosure of a senior mortgage, unless he is made a party to the foreclosure proceeding. *Hosford v. Johnson, 479*
5. *Same.—Redemption Money.—Terms of Mortgage.—Whole Mortgage Debt Must be Paid.*—The amount of redemption money to which a purchaser at a sale upon foreclosure of a senior mortgage is entitled depends on the terms of the mortgage, and not on the foreclosure judgment, nor on the amount he paid at the sheriff's sale. Junior incumbrancers can not redeem by paying the sum of the purchase-money, with interest, but they must pay the whole mortgage debt. *Ib.*
6. *Same.—Damages.—Attorney's Fees.—Offer to Redeem.*—Where a mortgage provides for attorney's fees, if suit be brought by reason of the default of the mortgagor, they become a part of the damages which the mortgagee is entitled to recover, and an incident of the principal debt; and whether such suit be brought on the notes alone, or on the notes and mortgage, his right to recover attorney's fees accrues, and they become a part of the mortgage debt, and junior mortgagees are bound to include the amount of such fees in their offer to redeem. *Ib.*
7. *Same.—Insurance Premiums.*—Where it is a part of the contract of a mortgagor, and a condition of the mortgage, that he shall keep the premises insured in a certain sum for the benefit of the mortgagee, charges for premiums paid by him for such insurance, which the mortgagor has neglected to obtain, are allowable as a part of the redemption money. *Ib.*
8. *Same.—Costs.*—Junior incumbrancers are not required to pay the costs of the foreclosure suit of their senior incumbrancer as a part of the redemption money. *Ib.*
9. *Same.—Mortgagee in Possession.—Rental Value.—Necessary Repairs.*—A mortgagee in possession is chargeable with the rental value of the property, and, on a redemption thereof, he is entitled to be reimbursed for all necessary repairs made on the mortgaged premises. *Ib.*
10. *Same.—Pleading.—Cross Complaint for Foreclosure.—Demurrer.*—A cross complaint seeking a foreclosure of a mortgage is insufficient upon demurrer, when neither the mortgage nor a copy is filed therewith. *Ib.*
11. *Mortgageable Interest.—Devisee.*—Where the alleged will of a testator is in fact an invalid instrument, the entire estate in his hands, legal and equitable, descends to his heirs, and the devisee has no mortgageable interest in the lands which the will purports to devise to him. *Jones v. Rhoads, 510*

MOTION.

See ASSIGNMENT OF ERROR, 1; DECEDENTS' ESTATES, 2; PLEADING, 3; PRACTICE, 3; REAL ESTATE, ACTION TO RECOVER, 8; SUPREME COURT, 27, 33, 34, 38, 43.

MOTIVES.

See EVIDENCE, 8.

MUNICIPAL CORPORATION.

See CITIES AND TOWNS, 15; NEGLIGENCE, 12 to 14.

MURDER.

See CRIMINAL LAW, 1.

NAMES.

See PLEADING, 6.

NEGLIGENCE.

See CITIES AND TOWNS, 15, 16, 20, 21.

1. *Keeping Vicious Animal.—Damages.—Pleading.—Complaint.*—The owner or keeper of a vicious dog, knowing it to be such, is liable *prima facie* in an action for damages to a person injured thereby; but he is not liable if the negligence of the party injured contributed to the injury, and the complaint in such action should aver that the plaintiff was without fault. *Williams v. Moray*, 25
2. *Employer and Employee.—Agreement as to Risks.*—An employee, when he enters the service of an employer, impliedly agrees to assume all risks ordinarily and naturally incident to the particular service; and the employer impliedly agrees that he will not subject the employee, through fraud, negligence or malice to greater risks than those which fairly and properly belong to the particular service in which the employee is to be engaged. *Lake Shore, etc., R. W. Co. v. McCormick*, 440
3. *Same.—Obligation of Employer to Employee.*—The employer's obligation is not to supply the employee with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employee to extraordinary or unreasonable danger. *Ib.*
4. *Same.—Master and Servant.—Correlative Duties.—Machinery Used.—Injury to Servant.*—When a master employs a servant to do a particular kind of work with particular kind of implements and machinery, the master does not agree that they are free from danger in their use, but that they are sound and fit for the purpose intended, so far as ordinary care and prudence can discover, and that he will use ordinary care and prudence in keeping them in such condition and fitness; and the servant agrees that he will use such implements and machinery with care and prudence; and if, under such conditions and circumstances, harm or injury come to the servant in the use of such machinery, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service. *Ib.*
5. *Same.—Improved Machinery.—Case Criticised.*—Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought, or claimed to be, better than those they have in use; but, if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for injuries which may occur to them in the use of such implements or machinery. *The St. Louis, etc., R. W. Co. v. Valerius*, 56 Ind. 511, criticised. *Ib.*
6. *Same.—Railroad Company.—Injury to Employee.—Brakeman.—Special Finding.*—In an action against a railroad company by a brakeman for an injury received while engaged in coupling cars, by his foot being caught in a dangerously constructed frog at a switch on the line of the road, the jury found specially that the switches and frogs of the road were in the same condition during all the time the plaintiff was in the employ of the defendant, and that they were of the same kind as those used on the principal railroads in the country; that plaintiff had full opportunity to acquire a knowledge of the condition of all the switches and frogs in the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that, while walking on the track behind a moving car, his foot was caught in one of the frogs; that the printed rules of the company forbid brakemen to go between

cars in motion to couple them, and forbid coupling by hand in all cases where a stick could be used; that, in consideration of employment by defendant, the plaintiff agreed to obey said rules; that, under the circumstances, the plaintiff used proper care to avoid injury to himself.

Held. that the defendant was not liable.

Ib.

7. *Presumption.—Railroad Company.—Damages.*—Where, in an action against a railroad company for damages for a personal injury caused by the alleged negligence of such company, the fact has been established that the plaintiff, while a passenger in the railroad car of the defendant, was injured, without his fault, by the car in which he was riding being thrown from the track and upset, the law will presume negligence on the part of such company, unless the contrary is shown by the evidence. *Pittsburgh, etc., R. R. Co. v. Williams, 462*
8. *Same.—Accident from Broken Rail.—Evidence.*—In such case, it is not sufficient for the defendant to show that the car was thrown from the track by reason of the breaking of a rail, sufficient in size and free from all defects, but it must also show that such broken rail had been properly laid down and spiked on sound and sufficient cross-ties. *Ib.*
9. *Same.—Instructions.—Sufficiency of Cars.—Duty of Common Carrier of Passengers.*—It is not error to refuse to instruct the jury in such case, that the company has performed its full duty as a common carrier of passengers, when it has furnished for their carriage a car or caboose which will run with safety while upon its road, but will be unable to resist the crash when thrown from its track. *Ib.*
10. *Same.—Defects at Points of Road Other than Where Accident Occurred.*—It was not error to instruct the jury in such case that proof of defects at other points in the road would not make a case of negligence at the place of the accident, nor render the defendant liable for the injury to the plaintiff, unless it was further shown that such defective condition caused or materially contributed to the accident. *Ib.*
11. *Cities and Towns.—Evidence.—Destitution of Family.*—In an action against a city, by the representative of a person whose death is alleged to have been attributable to the negligence of the defendant, evidence that the deceased's family was left in a destitute condition is incompetent. *City of Delphi v. Lowery, 520*
12. *Same.—Streets.—Duty of Municipal Corporation.*—Where there is a dangerous place in or near the usually travelled part of a street of a city, the municipal authorities must use ordinary care to protect persons who make lawful use of such street, in a reasonably prudent manner, from injury; and such duty is not fully discharged by making the travelled part of the street safe, but such measures as ordinary prudence requires must be taken to prevent persons, using ordinary care, from falling into dangerous places along the sides, or in close proximity to the termination, of the streets of the municipality. *Ib.*
13. *Same.—Evidence of Prior Injuries to Other Persons.—Notice.*—For the purpose of showing that a municipal corporation had notice of a dangerous place within or near the limits of one of its streets, evidence that other persons had previously been injured there is competent. *Ib.*
14. *Same.—City.—Common Council, Record of.—Evidence.*—A city corporation is represented by the common council, and the acts of that body, done in regular session, and within the scope of the powers conferred by law, are binding upon the corporation; and the record of such council, showing the report of a committee appointed by them, and the action taken thereon, is admissible in evidence against the municipal corporation. *Ib.*

15. *Same.—Instructions.—Measure of Damages.*—Where facts are allowed to go in evidence, which furnish an incorrect basis for the assessment of damages, an instruction which directs the jury to determine from “all the facts” the amount of recovery is erroneous. The jury are not to determine the amount of recovery from all the facts, but only from such facts as form proper elements for consideration in computing damages; and where facts are given in evidence which ought not to be considered in estimating damages, the instructions of the court should inform the jury what facts should be considered by them in making their estimate, and not leave it to them to take into account facts which have no legitimate bearing upon that branch of the case. *Ib.*
16. *Same.—Discretion of Jury.—Damages.*—A jury has a very broad discretion upon the subject of damages, but it is to be exercised upon proper facts; and improper elements influencing, not the judgment, but the passions or prejudices, should not form any part of the elements out of which the judgment of the jurors is to be constructed. *Ib.*

NEW TRIAL.

See APPEAL; ASSIGNMENT OF ERROR, 3; CRIMINAL LAW, 32, 33; PRACTICE, 2, 5, 10, 11; SUPREME COURT, 15, 16, 30, 40, 43.

NOMINAL DAMAGES.

See PLEADING, 24.

NON-RESIDENCE.

See REAL ESTATE, 11.

NOTICE.

See ATTACHMENT, 1; CITIES AND TOWNS, 9 to 12; CONTRACT, 1; DITCHES AND DRAINS, 5; LANDLORD AND TENANT, 1, 2; NEGLIGENCE, 13; REAL ESTATE, 2; VENDOR'S LIEN, 1.

OFFICE AND OFFICER.

See CITIES AND TOWNS, 3 to 7, 9 to 11, 23 to 25; COUNTY AUDITOR; CRIMINAL LAW, 39.

ORDINANCE.

See CITIES AND TOWNS, 15, 16, 18.

PARTITION.

See PRACTICE, 25.

1. *No New Title Gained Thereby.*—Partition of lands gives the parties to it no new or additional title to the parts allotted to them in severalty; but they respectively continue to hold the land by the former title merely divested of the title of their co-tenants. *Avery v. Akins*, 283
2. *Same.—Judgment.—Estoppel.—Widow.—Descents.*—A judgment in partition between a widow and her children, which allots to her in fee simple a part of the lands of which her husband died seized, to hold “free from any and all claim or demand whatever” of the children of said husband by her, operates only upon existing rights, and will not estop such children from claiming the estate which they would afterwards inherit upon her death, under section 18 of the act concerning descents, 1 R. S. 1876, p. 411. *Ib.*
3. *Same.—Conveyance During Subsequent Coverture, of Lands Derived from Deceased Husband.*—A widow with children, to whom is allotted by partition her share in severalty of the lands of her deceased husband, who was the father of such children, can not, during a subsequent marriage, convey the land so allotted to her; and upon her death during coverture such lands will descend, under section 18 of the act regulating descents, to the children of the marriage by which she obtained title. *Ib.*

4. *Will.—Testator.*—Real estate devised can not be partitioned contrary to the intention of a testator, expressed in his will. *Kepley v. Overton*, 448
5. *Answer.—Demurrer.*—In an action by a second wife for partition of land of her deceased husband, answers by the children and grandchildren of the deceased and his first wife, that she bought and paid for the land, and that her husband held it in trust for her, are sufficient on demurrer. *Derry v. Derry*, 560
6. *Same.—Widow's Rights.*—The law in force at the death of the husband is the measure of the widow's rights. *Ib.*

PARTNERSHIP.

See PLEADING, 4.

1. *Complaint.—Conversion.—Demand.*—In a complaint by one partner against another, after dissolution and settlement, alleging an agreement by the defendant to collect assets of the firm and apply them in payment of outstanding liabilities of the firm, and charging a conversion of the money collected to his own use and the use of others, it is unnecessary to aver a demand before the commencement of the suit. *Snyder v. Baber*, 47
2. *Same.—Implied Demand.*—An allegation that the defendant refused to account implies a demand for an accounting. *Ib.*

PAYMENT.

See JUDGMENT, 4; PROMISSORY NOTE, 4; REAL ESTATE, 8; REPLEVIN BAIL, 12.

1. *Appropriation of, by Creditor.*—A creditor can not, at his discretion, appropriate payments made by his debtor, after a controversy has arisen concerning them. *Applegate v. Koons*, 247
2. *Same.—Appropriation of, by Court.*—Payments thus made will be applied by the court according to the recognized rules of law governing the application of unappropriated payments. *Ib.*

PERJURY.

See CRIMINAL LAW, 44.

PERSONAL GOODS.

See CRIMINAL LAW, 13.

PLEADING.

See ACTION ON ASSIGNED DEBT, 2, 4; CHATTEL MORTGAGE, 3; CITIES AND TOWNS, 7, 15, 19, 20; CONSTABLE, 1 to 3; CONTRACT, 3; COSTS; CRIMINAL LAW, 3, 42, 43, 44; DECEDENTS' ESTATES, 4, 5, 7; MORTGAGE, 10; NEGLIGENCE, 1; PARTNERSHIP; PRACTICE, 19, 26; PROMISSORY NOTE, 1; REAL ESTATE, ACTION TO RECOVER, 1, 7, 8; SUPREME COURT, 5, 23.

1. *Practice.—Complaint.—Descriptio Personæ.—Medical Services to Paupers.*—In a complaint for medical services to paupers, rendered at the request of the trustee of a township, the word "as" before the official title, "trustee of Jackson township," is not necessary to show that he acted in his official capacity. *The Board, etc., v. Brewington*, 7
2. *Cross Complaint.—Notice.*—Notice of the filing of a cross complaint must be served on the defendants thereto to give a judgment thereon any validity. *State, ex rel., v. Ennis*, 17
3. *Motion to Make More Specific.—Demurrer.*—If an allegation be not sufficiently certain, a motion to make more specific, and not a demurrer for want of facts, is the remedy. *Snyder v. Baber*, 47
4. *Cross Complaint.—Partnership.—Receiver.*—A cross complaint, to withstand a demurrer for want of facts, must, like a complaint, state facts sufficient to constitute a cause of action; and, in an action by a member of a firm against his partner, a cross complaint asking a dis-

- solution and the appointment of a receiver, which alleged, in substance only, that the firm was largely indebted and was not making money, showed no ground for relief. *Shoemaker v. Smith*, 71
5. *Guardian's Additional Bond.—Defects Cured.*—A complaint on a guardian's bond averred that it was given as an additional bond for the sale of real estate, but the bond merely recited that "If the above bound" defendant, "who is guardian of the person and property of" certain wards, "minor heirs of," etc., "then the above obligation is to be void, else to remain in full force."
- Held*, on demurrer, that the complaint sufficiently shows that it was given as an additional bond, and that, under section 790 of the code, it was a good bond for that purpose.
- Held*, also, that where defects of form and recital appear on the face of a bond, a more particular suggestion of such defects is unnecessary. *Fee v. State, ex rel.*, 86
6. *Same.—Sureties.—Identity of Names and Persons.*—In such action, where the only averment of the execution of the bond is, that the guardian "executed his bond," and the only showing that the sureties joined in its execution is, that the names recited in the copy of the bond filed with the complaint are identical with the names of the defendants, and the names subscribed thereto either identical, or differing only in that the christian names are not given in full, but abbreviated or by initials, such complaint is insufficient as against such sureties. *Ib.*
7. *Same.—General Denial.—Proof.*—Under plea of general denial, the guardian in such action could prove that he had "fully performed all the conditions of said bond according to the tenor and legal effect thereof." *Ib.*
8. *Practice.—Demurrer.*—A complaint good in part is sufficient on a demurrer to it as an entirety. *Farman v. Chamberlain*, 82
9. *Answer.*—An answer which purports to answer the entire complaint, but answers only a part, is insufficient on demurrer. *Ib.*
10. *Answer.—Demurrer.—Harmless Error.*—Where all the evidence which might be given in support of paragraphs of answer is admissible under other paragraphs, demurrers are not improperly sustained to them. *Moral School Tp. v. Harrison*, 93
11. *Complaint.—Fatal Omission*—A failure to aver that the commissioners had ordered either the construction or improvement of a gravel road is a fatal omission from a paragraph of complaint on a bond taken under the provisions of said act of March 14th, 1877. *State, ex rel., v. Sullivan*, 121
12. *Complaint.—Presumption.—Evidence.—Defects Aided by Finding.*—Many defects which a demurrer would reach are aided by a verdict or the finding of the court, and where there are sufficient general facts stated in the complaint to show that the omissions were such as might have been supplied by the evidence, they will be presumed, on appeal, to have been so supplied. *Charlestown School Tp. v. Hay*, 127
13. *Same.—Common School.—Township Authorities.—Waiver.*—A teacher of a common school is entitled to compensation, if the failure to actually conduct the school each day of the term was caused by the wrongful act or omission of the township authorities; and where the evidence shows that a strict performance of the conditions has been prevented or waived by such act or omission, a recovery can not be defeated by such failure. *Ib.*
14. *Demurrer for Want of Capacity to Sue.—Practice.*—A demurrer assigning the statutory cause of want of legal capacity to sue is proper only in cases where there is some legal disability, such as infancy, idiocy or coverture. *Nave v. Hadley*, 155

15. *Same.—Demurrer for Want of Sufficient Facts.*—Where a complaint by several plaintiffs fails to show a cause of action in all, a demurrer will lie upon the ground that it does not state facts sufficient to constitute a cause of action. *Ib.*
16. *Written Instrument not Foundation of Action or Defence.*—A party is not required to file with his pleadings an instrument in writing which is to be used merely as evidence at the trial and does not constitute the foundation of his action or defence. *Ragsdale v. Parrish, 191*
17. *Foreclosure of Mortgage.—Cross Complaint.—Demurrer.*—In an action to foreclose a mortgage, a demurrer to a cross complaint, on the ground that it “does not state facts sufficient to prevent said plaintiff from foreclosing said mortgage for the full amount of the debt due therein,” contains no cause for demurrer known to the statute, or that should be recognized in practice, and the exception to the overruling thereof presents no question. *Martin v. Martin, 207*
18. *Complaint.—Assignment of Error.—Intendments in Favor of Pleader.—Practice.*—Where a complaint has not been tested by demurrer, and its sufficiency was first brought in question by assignment of error in the general term of a superior court, it must be tested by the rule which is applied to motions in arrest of judgment, and, instead of indulging presumptions against the pleader, all reasonable intendments should be allowed in his favor. *Smock v. Harrison, 348*
19. *Same.—Defects Cured by Verdict.*—Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor. *Ib.*
20. *Same.—Conclusion of Law.—Bond.—Supersedeas.—Verdict.*—An averment in a complaint not tested by demurrer, “that said appeal bond operated as a supersedeas in said cause,” though, strictly speaking, a mere statement of a legal conclusion, should be regarded as bringing in issue and admitting proof of such facts, if any, as would make the bond have that effect, and after verdict for the plaintiff, it must be presumed that such proof was made, if it was legally possible to make it under proper averment. *Ib.*
21. *Complaint.—Promissory Note.—Payee's Indorsement.—Indorsers.—Consideration.*—Where a complaint against the makers and indorsers of a promissory note contains an averment that the indorsement of the latter was made “on said day and at the same time of the making and delivery of said note,” it is manifest that, even if the payee's indorsement appear first and he is bound as the first indorser, the names of the other indorsers were on the paper when received by the plaintiff, and that the instrument imported a consideration against them all, and no special averment of a consideration was necessary. *Swift v. Ratliff, 426*
22. *Practice.—Exhibit.*—An exhibit which does not constitute the foundation of a pleading, though filed therewith, will not be considered by the Supreme Court, either for the purpose of sustaining or overthrowing such pleading. *Tindall v. Wasson, 495*
23. *Harmless Error.—General Denial.*—It is a harmless error to sustain a demurrer to an answer, when all the material facts averred therein are admissible in evidence under the general denial, also pleaded. *Cooper v. Metzger, 544*
24. *Same.—Action on Bond.—Nominal Damages.*—In an action on a replevin bond, an answer showing that the obligors, after breach, did an act taking away all right to recover anything more than nominal damages, is not a showing that there is no right of action at all on the bond. *Ib.*
25. *Must State Facts.*—A bare general statement, thrown into the body of a pleading setting forth specific facts, can not control the plead-

ing and make good what would otherwise be insufficient: the substantive traversable facts are to be looked to in determining its sufficiency, and not mere conclusions. *Stack v. Beach*, 571

28. *Co-Sureties.—Contribution.—Insolvency of Principal.*—In an action by one surety against another for contribution, it is not necessary to either aver in the complaint or prove on the trial that the principal is insolvent. *Croy v. Clark*, 597

POSSESSION.

See ALIEN, 2; REAL ESTATE, 2, 3, 13.

POUND FENCE.

See CITIES AND TOWNS, 15 to 22.

PRACTICE.

See APPEARANCE; ASSIGNMENT OF ERROR; CONTRACT, 3; CRIMINAL LAW, 18, 29, 32, 35, 46; DECEDENTS' ESTATES, 2, 5, 9; DITCHES AND DRAINS, 3; FRAUDULENT CONVEYANCE; INTERROGATORIES TO JURY; PLEADING, 1, 8, 14, 15, 18, 22; PRESUMPTION, 2; REAL ESTATE, ACTION TO RECOVER, 8; SPECIAL FINDING; SUPREME COURT; VENIRE DE NOVO; WILL, 3, 4.

1. *Special Finding.—Exception.*—An exception to the conclusions of law by the court upon a special finding of facts is an admission that the facts are correctly found. *Lockwood v. Dills*, 56
2. *Same.—New Trial.*—If the court finds the facts contrary to the evidence, whether by admission or otherwise, the remedy is by a motion for a new trial, and not by an exception to the conclusions of law on such finding. *Ib.*
3. *Rule of Court.—Motion for Change of Judge.—Cause for.*—A rule of court, requiring an application for a change of judge to be filed on or before the second day of the term, can not deprive a party of the right to a change of judge, upon motion made after the second day of the term, where his affidavit, properly setting forth a statutory cause, shows that he did not discover such cause until the day of the making of the motion. *Shoemaker v. Smith*, 71
4. *Harmless Error.*—No available error is committed in striking out an answer, where the matters therein pleaded are admissible under the general denial, already pleaded. *Robinson v. Snyder*, 110
5. *Same.—Exception to Special Finding.—Motion for New Trial.—Case Explained.*—An exception to a conclusion of law does not preclude a motion for a new trial on the ground that the special finding is not sustained by the evidence. *Cruzan v. Smith*, 41 Ind. 288, explained. *Ib.*
6. *Same.—Effect of Exception to Special Finding.*—The effect of an exception to a special finding is to admit, for the purpose of the exception, the truth of the facts found, but the admission is not conclusive. *Ib.*
7. *Harmless Error.—Cross Complaint.—Demurrer.*—Where there is no substantial difference between the question presented in two paragraphs of a cross complaint, it is harmless error to sustain a demurrer to one of them. *Long v. Williams*, 115
8. *Same.—Special Finding.*—Where a fact is not referred to in the special finding, no question is reserved in regard thereto by an exception to the conclusions of law from the facts found. *Ib.*
9. *Same.—Commencement of Action.—Impetration.*—The general rule is, that an action is not commenced until the impetration of the writ. *Charlestown School Tp. v. Hay*, 127
10. *Agreed Facts.—New Trial.*—Where a finding is rendered upon "agreed facts," no reason for a new trial exists. *Martin v. Martin*, 207
11. *New Trial.—Evidence.*—Error of the court in permitting the introduction of evidence is "error of law occurring at the trial," and

when excepted to at the time constitutes cause for a new trial, in a motion therefor addressed to the trial court. *Edwards v. Powell*, 294

12. *Promissory Note.—Alteration.—Interest.—Collateral Facts.—Evidence.—Argument.*—Where notes in payment for a threshing machine were to be written "with 10 per cent. interest." and the question before the jury was whether or not the note sued on had been altered after its execution by inserting the figures "10" between "with" and "per cent. interest," making the note draw ten instead of six per cent. interest, the trial court did not err in holding that an agent's parol promise to pay defendants for time lost while waiting for the machine was immaterial, nor in requiring their counsel to refrain from commenting upon it in argument. The rule is that collateral facts should be excluded. The agent's promise to pay the defendants for lost time was purely collateral to the fact in issue, and was therefore immaterial. *Bunting v. Heilman*, 344
13. *General Finding.—Later Special Finding not Available.*—A general finding remaining in the record will support the judgment of the court, notwithstanding a special finding and conclusions of law rendered ten days or more thereafter, which purported to be done at the request of appellants made at the commencement of the trial. *Smock v. Harrison*, 348
14. *Removal of Cause to United States Court.—Time of Application.*—The petition for the removal of a cause from a State court to a Federal court may be made at any time before the trial or final hearing of the suit in the State court. *Sharp v. Gutcher*, 357
15. *Same.—Void Acts of State Court.*—After a sufficient petition for removal has been filed, the State court can do nothing more than to perfect the removal, and any acts in attempting to retain jurisdiction would be *coram non judice* and void. *Ib.*
16. *Same.—Answer.*—An answer setting up the filing of a petition, etc., for removal, is a sufficient answer in bar of further proceedings in the State court. *Ib.*
17. *Endorsement on Complaint Fixing Return Day of Summons.—Statute Construed.—Attorney.*—Where, under section 315 of the code, as amended by the act of March 6th, 1877, Acts 1877, Reg. Sess., p. 105, the endorsement upon a complaint directing the clerk to issue a summons, and fixing the day of the term upon which the defendant shall appear, is signed "W. & T., Att'ys," who had signed and filed the complaint, such endorsement is sufficient to authorize the clerk to issue a summons for the defendant to appear and answer the complaint on the day named. *Robinson v. Brown*, 365
18. *General Verdict.—Answers to Interrogatories.*—A motion for judgment on the facts found, notwithstanding the general verdict, is properly overruled, where the answers are not inconsistent with the general verdict, or where the facts found are immaterial without a further finding, or do not appear in the pleadings. *Ib.*
19. *Pleading.—Demurrer.*—If an allegation of a pleading is one that the pleader can be heard to make, and it be well pleaded, a demurrer admits it to be true, otherwise it does not. *Goddard v. Stockman*, 406
20. *Same.—Evidence.—Promissory Note.—Discharge of Surety by New Writing.—Burden of Proof.—Production of Writing.—Proof of Contents.*—One who sets up a defence, whereby he claims a release from one writing by reason of the execution of another, does not shift the burden of proof on the subject until he shall have produced the new writings on which he relies, or, having shown a good excuse for not producing it, shall have proved its contents. *Swift v. Ratliff*, 426

21. *Same.*—*Release of Surety.*—*Extension of Time.*—*Supreme Court.*—Where one seeks release from a promissory note for the reason that the plaintiff took a note payable in bank in payment of interest thereon, in advance, and thereby created an implied agreement to extend the time of its payment, the interest note is the best evidence of its own contents, and where, being present and sufficiently identified and its execution proved, it was not offered in evidence, the Supreme Court can not say that parol evidence of its terms was improperly excluded, or that a verdict against the defendant ought to have been different. *Ib.*
22. *Same.*—*Judicial Discretion.*—*Recalling Witness.*—It is a matter of judicial discretion, whether a witness once discharged from the witness stand may be recalled by the party who first called him. *Ib.*
23. *Same.*—*Repetition of Testimony.*—To exclude a mere repetition of testimony is not an available error. *Ib.*
24. *Answer of Jury to Interrogatory.*—Where the jury were unable, from the evidence, to give the "hour and minute" at which the accident occurred, but returned in answer to a question as to such fact submitted to them, that "From the nature of the question, we can not so positively answer," the court did right in accepting such answer, and discharging the jury from the further consideration of such question. *Pittsburgh, etc., R. R. Co. v. Williams, 462*
25. *Partition.*—*Action on Bond of Commissioner Appointed to Sell.*—*Rents and Profits.*—*Evidence.*—On the trial of an action by heirs upon the bond of a commissioner appointed to sell real estate in a proceeding for partition, plaintiffs can not, while suing for the purchase-money and interest, claim, and give evidence of, the rents and profits which have accrued after the sale. *Stanton v. State, ex rel., 503*
26. *Insufficient Answer to Insufficient Complaint.*—A bad answer is a sufficient answer to an insufficient complaint, and such complaint will not support a judgment thereon. *Vert v. Voss, 565*

PRESUMPTION.

- See BILL OF EXCHANGE, 1; CITIES AND TOWNS, 7, 11; CRIMINAL LAW, 36, 47; JURISDICTION, 2; NEGLIGENCE, 7; PLEADING, 12; PROMISSORY NOTE, 5; REPLEVIN BAIL, 6; SUPREME COURT, 4, 6, 44, 46.
1. *Value of Services.*—Services rendered upon proper request are presumed to be of some value. *The Board, etc., v. Breckington, 7*
 2. *Instructions.*—*Evidence.*—*Practice.*—Where the evidence is not in the record, instructions will be presumed to be correct if applicable to any supposable state of the evidence. *Stratton v. Kennard, 302*

PRINCIPAL AND AGENT.

See CITIES AND TOWNS, 10, 15, 16.

1. *Undisclosed Principal.*—*Promissory Note.*—An undisclosed principal may sue upon a promissory note payable to the agent, subject to all equities growing out of the transaction. *Nave v. Hadley, 155*
2. *Same.*—*Note Payable to Cashier.*—The word "cash." affixed to the name of the payee indicates that the note is payable to the bank, and the bank may sue thereon as payee, the agent being a party to the action. *Ib.*

PRINCIPAL AND SURETY.

See DITCHES AND DRAINS, 9; PLEADING, 6, 26; PRACTICE, 20, 21; PROMISSORY NOTE, 4; REPLEVIN BAIL, 11.

PRIORITY OF LIEN.

See JUDGMENT, 6, 8.

PROCESS.

See JUDGMENT, 2, 3; JURISDICTION, 4; PRACTICE, 17.

PROMISSORY NOTE.

See BILL OF EXCHANGE; CONTRACT, 4; MORTGAGE, 6; PLEADING, 21; PRACTICE, 12, 20; PRINCIPAL AND AGENT; REPLEVIN BAIL, 12.

1. *School Township.—Complaint.*—A complaint upon a note of a township, averring that it was executed for an indebtedness against the school township, and showing that the articles for which it was given were “dissected maps of the United States,” makes it sufficiently apparent that it was the intention of the parties to bind the school, and not the civil, township. *Moral School Tp. v. Harrison, 93*
2. *Consideration.*—*Gifts inter Vivos and Causa Mortis.*—*Testamentary Disposition.*—The desire of a testator to rectify an inequality in the provisions of his will is not a sufficient consideration to support a note given for that purpose only. *Mallett v. Page, 8 Ind. 364*, criticised and explained. *West v. Cavins, 265*
3. *Same.—Executed and Executory Contracts.*—While natural love and affection is a good consideration for a deed or any executed contract as between the parties thereto, it is not so for an executory contract. *Ib.*
4. *Principal and Surety.—Release.—Payment.—Reloan.—Fraud.*—In an action upon a promissory note, against the principals and the surety, the evidence showed that in the presence of one of the makers of the note and of the payee, the surety gave notice that he would not remain longer as surety thereon; that the maker then said to the payee, “If you will let our firm have the money on our own note we will take it, otherwise we will pay you off.” To which the payee replied: “I don’t want the money. I will take ‘Taylor’s’” (the surety’s) “name off the note. I will bring down the note and fix the matter up, and either get new notes or take the money.” But no new note was executed, and for several years thereafter the makers paid interest on the note, of which facts the surety was ignorant, and after their insolvency this suit was instituted.
Held, that the transaction amounted to a payment of the note and a re-loan of the money to the makers, and that the surety was thereby discharged from any liability thereon.
Held, also, that keeping a surety so long in ignorance that the note had not been paid, or exchanged for the note of the principals, had all the effect of a fraudulent concealment of the facts, whether so intended or not. *Taylor v. Lohman, 418*
5. *Payable in Bank.—Accommodation Indorser.—Presumption as to Liability.—Indorsee.—Payee.*—The liability of one who indorses mercantile paper, before its indorsement by the payee, is *prima facie* that of a strict indorsement, which will not operate in favor of the payee, but of his indorsee only. *Kealing v. Vansickle, 529*
6. *Same.—Indorsement Before Delivery.—Parol Evidence.—Maker.—Surety.*—If such indorsement be made before delivery of the paper, and for the purpose of giving it credit with the payee, it will create a liability, in favor of the payee, *prima facie* of indorsement; but parol evidence is admissible to show that the liability, mutually intended, was that of a maker or surety. *Sill v. Leslie, 16 Ind. 236*, distinguished. *Ib.*
7. *Note Payable to Cashier.*—The word “cash.” affixed to the name of the payee of a promissory note indicates that the note is payable to the bank, and the bank may sue thereon as payee, the agent being a party to the action. *Nave v. Hadley, 155*

PROSECUTING ATTORNEY.

See ALIEN, 1; CRIMINAL LAW, 31, 38.

1. *Thirty-fifth and Fortieth Judicial Circuits.—Statute Construed.—Waiver.*—Noble, DeKalb and Steuben counties composed the Thirty-fifth Judicial Circuit prior to March 21st, 1879, the judge and prose-

cutor both residing in Noble. In 1878 the relator, a resident of Steuben, was elected prosecuting attorney of said circuit, for the two years commencing October 28th. 1879. By the act of March 21st. 1879, it was provided that, on and after its passage, Steuben and DeKalb should constitute the Fortieth Judicial Circuit until October 1st. 1880, when they were again to become a part of the Thirty-fifth Circuit, and that the prosecutor-elect of the Thirty-fifth Circuit should be the prosecutor of the Fortieth on and after his term commenced. Under said act, the relator was appointed prosecutor of the Fortieth Circuit, and served in that capacity till October 28th. 1879, when he qualified under his election, and continued to serve and designate himself as prosecutor of the Fortieth Circuit till October 1st, 1880, and after that date so styled and signed himself, and received his compensation. At the October election, 1880, the defendant was elected prosecutor of the Thirty-fifth Circuit, but received no commission till February, 1881, when he qualified and entered upon the duties of his office.

Held, that said act created a new circuit, in which the office of prosecutor was vacant, which the Governor had a right to fill.

Held, also, that by force of said statute, the relator, on qualifying under his election, became the prosecutor of the Fortieth Circuit, so long as it lasted, and thereafter of the Thirty-fifth Circuit until October 28th, 1881, when the defendant's term will commence.

Held, also, that the fact that the relator wrongly claimed to be, and designated himself as, the prosecutor of the Fortieth Circuit after it ceased to exist, constituted no waiver of his title by election and statute to the office of prosecutor of the Thirty-fifth Circuit.

State, ex rel. Adams, v. Peterson, 174

2. **Information.—Prosecuting Attorney his own Relator.**—The prosecuting attorney may prosecute an action upon his own relation against a person who unlawfully intrudes into the office of prosecuting attorney. *Ib.*

3. **Fees on Forfeited Recognizances.—Statute Construed. Fees and Salaries.**—Upon an application to the circuit judge, under section 36, Acts 1879, p. 142, for a construction of section 23½ of the act in relation to fees and salaries, 1 R. S. 1876, p. 475, on appeal.

Held, that a prosecuting attorney is not entitled to the percentage therein provided, on money paid to him on a forfeited recognizance before final judgment thereon. Such percentage is allowed only on money collected on final judgment, in actions prosecuted by him on such recognizances.

Ex Parte Ford, 415

PUBLIC PLACE.

See LIQUOR LAW, 1 to 3.

RAILROAD.

See CITIES AND TOWNS, 2, 8; CONSIGNMENT; CONSTITUTIONAL LAW; COUNTY COMMISSIONERS, 11 to 17; CRIMINAL LAW, 35; NEGLIGENCE, 6 to 10.

1. **Killing Stock.—Highway Crossing.—Duty to Fence.—Cattle-Pits.**—It is as much the duty of a railroad company to fence against animals on a highway as against animals in adjoining fields or woods, and proper cattle-pits at highway crossings are necessary to prevent animals passing from the highway on to the railroad track.

Evansville, etc., R. R. Co. v. Barbee, 169

2. **Same.—Instruction.**—Instructions, in effect, that if animals went on the railroad track at a crossing of the highway, and were killed some distance from the highway, the railroad company would not be liable upon the ground of the want of a fence, were properly refused. *Ib.*

3. **Same.—Harmless Error.**—Where a verdict is clearly in accordance with the evidence, no harm can result to the appellant because a charge given to the jury was not applicable to the evidence. *Ib.*

RATIFICATION.

See INFANCY, 1.

REAL ESTATE.

See CONVEYANCE; GUARDIAN AND WARD, 1; TRUSTS; VENDOR AND PURCHASER; WILL, 2.

1. *When Deed Absolute Treated as Mortgage.—Security.*—A deed of realty, though absolute on its face, will be treated in equity as a mortgage only, if the purpose of its execution was to secure the payment or discharge of an existing debt or liability. *Tuttle v. Churchman*, 311
2. *Possession Constructive Notice.*—As a general proposition, the possession of real estate is constructive notice to all the world of the rights of the party in possession. *Ib.*
3. *Exception to Rule.—Grantor's Possession After Conveyance.*—The fact that a grantor remains in possession of his land after conveying it away by a deed absolute on its face is not constructive notice to purchasers of a judgment against the grantee of the grantor's right to have his deed treated as a mortgage. *Ib.*
4. *Innocent Purchasers of Judgment Against Grantee.—Superior Right.—Lien.*—Purchasers of a judgment against a grantee which, by the records, appears to have become a lien on land conveyed by a deed absolute on its face, having expended their money upon the faith of that appearance, paying the full amount thereof, in ignorance and without notice of the fact that the deed was only a security, or claimed as such, acquire a right superior to the right of the grantor acquired by a reconveyance of the lands and by actual continued occupation thereof. *Ib.*
5. *Decedents' Estates. — Descents.—Widow's Interest.—Vendor's Lien Paramount.*—If a purchaser of real estate die the absolute owner of a title bond thereto, the lien of the vendor for the purchase-money due him is paramount to the claim of his widow. *Keith v. Hudson*, 333
6. *Same.—Surety.—Assignment of Title Bond.—Indemnity.—Subrogation.*—Where a title bond has been assigned to indemnify a surety, with agreement to reassign, and the surety has, after the death of the vendee, assumed the payment of the notes for purchase-money, as well as the notes on which he was surety, and the administrator has surrendered his agreement to reassign the title bond, the surety is subrogated to the rights of the vendor, and may hold the bond, or the land if he has received a deed, until the debts for which the bond was pledged to him are paid. *Ib.*
7. *Same. — Widow's Remedy. — Accounting.*—In such case, the surety holds the bond, or the land, as a security, and the widow's remedy is to have an accounting, and to redeem the premises when the amount due the surety is ascertained. *Ib.*
8. *Same.—Part Payment of Consideration.*—Under section 30 of the statute of descents, the lien of a vendor for purchase-money of land yields in part to the claim of the widow of the vendee, and if the husband has paid part of the consideration, and the real estate is sold under any decree, or by virtue of any power or devise in his will, she is entitled to her third of such land, in proportion to the amount paid thereon. *Ib.*
9. *Sale for Unpaid Taxes.—Action to Recover and Quiet Title.—Statute of Limitation.*—An action brought in 1879 to recover possession of real estate sold for taxes in 1863, and to quiet the title, was too late under section 250 of the act of December 21st, 1872, 1 R. S. 1876, p. 127. *Smith v. Bryan*, 515
10. *Same.—Where Time Allowed had Expired.*—A reasonable time must be allowed for instituting suit as to causes of action existing at the passage of such a law; and where the whole time allowed by the

statute had expired before its passage, the statute did not apply until the time allowed by it had run. *Ib.*

11. *Same.—Legal Disabilities.—Non-Residence.—State.—United States.—*The phrase "other legal disabilities," in the proviso of section 250, *supra*, does not embrace non-residence in the State, but, so far as it refers to absence, means "out of the United States." 2 R. S. 1876, p. 313, sec. 797. *Ib.*
12. *Same.—Valid or Void Sale for Taxes.—Statute of Limitations Good Plea in Bar.—*Whether a tax sale was valid or void, a plea of the statute of limitations is a good defence to an action to quiet title, and, if sustained by the evidence, bars a recovery of possession, and the title of the party so barred can not be quieted. *Ib.*
13. *Same.—Evidence.—Title.—Possession of Grantor.—*In an action to recover real estate, the plaintiff recovers on the strength of his own title, and not on the weakness of the defendant's title, and he must trace his title to the United States, or to a grantor in possession. *Ib.*

REAL ESTATE. ACTION TO RECOVER.

See CONVEYANCE; ESTOPPEL, 1; LANDLORD AND TENANT, 1; REAL ESTATE, 9.

1. *Complaint Before Justice.—Sheriff's Sale.—*In a complaint before a justice of the peace to recover possession of real estate, an averment, that the property sued for was sold to plaintiff in pursuance of a judgment of foreclosure, will be held to mean that it was sold by the sheriff as provided by section 635, 2 R. S. 1876, p. 263, and is sufficiently certain, after verdict. *Allen v. Shannon, 164*
2. *Same.—Description of Premises.—*A description of premises in a deed as "a part of lot 235 in the city of Vincennes, according to Ennison and Johnson's survey, commencing fifty-five feet from the corner of said lot, on Sixth and Main streets, and fronting on Main street fifty-five feet, and running back the same width the full depth of said lot, one hundred and seventy-six feet," is not so vague as to render the conveyance void. A reference to the plat and survey may make it perfectly clear and definite. *Ib.*
3. *Same.—Evidence.—Collateral Proceeding.—Decree of Foreclosure.—Default.—*In a collateral proceeding, the recital in a decree of foreclosure rendered upon the default of the mortgagors (the summons and return not being on file), that the defendants were duly summoned more than ten days before the first day of the term, is affirmative evidence that the court had acquired jurisdiction of the persons of the defendants. *Ib.*
4. *Same.—Variance.—Sheriff's Return.—*Where a sheriff makes return that a writ issued to him upon a decree of foreclosure was satisfied by the sale, it must be deemed to have been so satisfied by a sale of the proper lot, notwithstanding there may be some discrepancy between the particular descriptions in the decree and return. *Ib.*
5. *Same.—Defective Return.—*A defective return of an execution or order of sale will not vitiate the title of a purchaser whose deed contains the same description as the decree, which was sufficient. *Ib.*
6. *Same.—Landlord and Tenant.—*Under section 10, 2 R. S. 1876, p. 341, a successor to the title of a mortgagor by foreclosure, sale and sheriff's deed, is entitled to the same remedy as the latter to obtain possession of lands on the termination of the tenancy of a lessee. *Ib.*
7. *Pleading.—Complaint.—*The omission of the word "unlawfully," from a complaint for the recovery of real estate, does not render it bad on demurrer thereto for want of facts, if its equivalent in meaning is used therein; and the allegations, that the plaintiffs were entitled to the possession of the real estate, and that the defendants kept them out of it, *without right*, are sufficient. *Smith v. Kyler, 575*

8. *Same.—Mistake in Title Papers Corrected.—Quieting Title.—Pleading.—Practice.—Motion to Strike Out.—Demurrer.*—In an action to recover the possession of real estate and to quiet title thereto, the plaintiff may, as an incident to such action, under section 71 of the code, 2 R. S. 1876, p. 70, have a mistake in his title papers corrected in such suit, and if the complaint states a good cause of action for the recovery of the real estate and for quieting title thereto, a demurrer will not lie, even though the allegations thereof in regard to the alleged mistake in the deed were defective and insufficient; an objection to the complaint for such cause can be reached either by a motion to strike out or to make more specific the allegations in regard to the alleged mistake. *Ib.*

REASONABLE DOUBT.

See CRIMINAL LAW, 9, 12.

RECEIVER.

See APPEAL; PLEADING, 4.

RECOGNIZANCE.

See CRIMINAL LAW, 38; PROSECUTING ATTORNEY, 3.

RECORD.

See APPEARANCE; COUNTY COMMISSIONERS, 11, 12; SUPREME COURT.

REDEMPTION.

See ESTOPPEL, 2; MORTGAGE, 5, 6.

RELEASE OF SURETY.

See PRACTICE, 21; PROMISSORY NOTE, 4.

REMITTITUR.

See MORTGAGE, 3.

REMOVAL OF CAUSES TO UNITED STATES COURT.

See PRACTICE, 14 to 16.

REPAIRS.

See CITIES AND TOWNS, 12; MORTGAGE, 9.

REPLEVIN BAIL.

See JUDGMENT 4, 5, 7.

1. *Invalid Entry.*—Writing an undertaking of replevin bail upon a separate piece of paper, and attaching it to the page of the docket of a justice of the peace, on which the judgment appears, by pinning it thereto, is not "entering" it upon such docket within the meaning of section 84, 2 R. S. 1876, p. 632, and such undertaking is therefore invalid as a recognizance of replevin bail. *Lockwood v. Dills, 56*
2. *Execution.—Judgment.—Levy.—Justice of the Peace.*—Where the replevin bail upon a judgment rendered by a justice of the peace procures the issuance of an execution on such judgment, within the time allowed by law for the stay thereof, without the affidavit and notice required by section 94, 2 R. S. 1876, p. 635, such execution is unauthorized, and the constable may return it without making a levy. *Palmer v. Galbreath, 84*
3. *Same.—Right to Control Execution.*—A replevin bail has no right to direct or control an execution issued on a judgment after the expiration of the stay of execution thereon, without having first paid off the judgment. *Ib.*
4. *Entry of.—Affidavit.—Confession of Judgment.*—Section 385, 2 R. S. 1876, p. 190, in relation to the confession of judgment, does not require any affidavit in connection with the contract and entry of replevin bail. Such bail undertakes for the payment of the debt of another, which is already in judgment, excluding inquiry concerning its validity or the amount due thereon. *Ensley v. McCorkle, 240*

5. *Same.—Attestation of, by Clerk.*—Where the entry of replevin bail on a judgment rendered in the circuit court was not formally approved or attested by the clerk thereof, such entry is not, for that reason, invalid or of less legal effect than if there had been such formal approval. *Ib.*
6. *Same.—Presumption.—Statute Construed.*—Section 421, 2 R. S. 1876, p. 202, does not in terms require an attestation or formal approval by the clerk of the entry of the recognizance of replevin bail; and, in the absence of an unequivocal showing that the entry was made without his knowledge and approval, the existence of the entry upon the judgment docket of the court is sufficient proof of his approval. *Ib.*
7. *Same.—Foreclosure.—Execution Against Replevin Bail, Where There is no Personal Judgment.—Clerk may Issue.*—Where a judgment of foreclosure is rendered without any personal judgment, and an entry of replevin bail is written and signed immediately following the decree, the clerk may, after the sale of the mortgaged premises, issue an execution against the property of the replevin bail for any balance remaining unsatisfied of such decree without any order of the court therefor. *Ib.*
8. *Attestation by Justice.*—An entry of replevin bail on a judgment rendered by a justice of the peace is not void because it was not attested by the justice. *Eltzroth v. Voris, 459*
9. *Same.—Delay in Issuing Execution does not Release.*—Mere delay in issuing execution will not release a replevin bail. *Ib.*
10. *Same.—Entry After Judgment had Ceased to be Repleviable.—Execution.*—The entry of replevin bail, after a judgment has ceased to be repleviable, either upon the docket of a justice of the peace or upon the record of the judgment in the circuit court, does not constitute a judgment upon which an execution can be issued. *Ib.*
11. *Subrogation.—Principal and Surety.*—The rule, that where a surety, such as replevin bail, has been compelled to pay the debt of his principal, for which the creditor holds other security, such surety will be subrogated to the creditor's rights in such other security for his reimbursement, is applicable only where the surety or replevin bail has paid the whole debt covered by the security held by the creditor, or where it appears that the residue of the debt, not paid by such surety or bail, has been otherwise fully paid. *Vert v. Voss, 565*
12. *Same.—Judgment.—Mortgage.—Payment.*—Where the judgment on which a replevin bail was liable had been rendered on one of several promissory notes, all of which were secured by mortgage on real estate, and some of which were not due at the rendition of the judgment, the payment of such judgment by the replevin bail would not entitle him to be subrogated to the rights of the judgment creditor. *Ib.*

REPUGNANCY.

See CRIMINAL LAW, 14.

RES GESTÆ.

See CRIMINAL LAW, 24.

RULE OF COURT.

See PRACTICE, 3.

SALARY.

See CITIES AND TOWNS, 5.

SALE.

See ACTION ON ASSIGNED DEBT, 1, 4; ALIEN, 5 to 7; CITIES AND TOWNS, 6; GUARDIAN AND WARD, 1; LIQUOR LAW, 4, 6, 8 to 12.

A sale implies the transfer of property for money, though time may be given for payment. *Massey v. State, 368*

SCHOOL COMMISSIONERS.

See CITIES AND TOWNS, 4, 7.

SCHOOL FUND.

See COUNTY AUDITOR.

SCHOOL LAW.

See COUNTY AUDITOR.

School Fund Mortgage.—Sale of Land by Auditor.—Common School.—Recorded Deed Must be Tendered to Purchaser.—A suit for the purchase-money of land sold by a county auditor, under a school fund mortgage, can not be maintained without a tender of the deed for the property, not absolute, but conditioned upon payment therefor, recorded as required by section 99 of the act in relation to common schools, 1 R. S. 1876, p. 778. *Johnson v. State, ex rel., 588*

SCHOOL TRUSTEE.

CITIES AND TOWNS, 23 to 25.

SELF-DEFENCE.

See CRIMINAL LAW, 2.

SHERIFF.

See ACTION ON ASSIGNED DEBT, 1, 4.

SHERIFF'S SALE.

See ACTION ON ASSIGNED DEBT; REAL ESTATE, ACTION TO RECOVER, 1, 4, 5.

SIGNING RECORD.

See COUNTY COMMISSIONERS, 12.

SPECIAL FINDING.

See NEGLIGENCE, 6; PRACTICE, 1, 5, 6, 8, 13; SUPREME COURT, 11.

1. *Practice.—Verdict.*—When the special finding of the facts is inconsistent with the general verdict, the former will control the latter, and the court must give judgment accordingly.

Lake Shore, etc., R. W. Co. v. McCormick, 440

2. *Conclusions of Law.*—The office of a special finding is to state the facts proved, not items of evidence merely; and the statement of legal conclusions, upon such a finding, should embrace matters of law only, and not matters of fact. If, in the finding, items of evidence only are stated, instead of the fact which ought to be found, and if the statement of the legal conclusions embraces matters of law, and also matters of fact which ought to have been found as such, a *venire de novo* will be granted. *Kealing v. Vansickle, 529*

STATUTE.

Speaks From Time of Taking Effect.—An act of the General Assembly speaks, not from the time of its approval, but from the time it took effect. *Evansville, etc., R. R. Co. v. Barbee, 169*

STATUTE CONSTRUED.

See ACTION ON ASSIGNED DEBT, 1; ALIEN, 1; ATTACHMENT, 6; CHANGE OF VENUE; CITIES AND TOWNS, 3, 4, 8, 23, 24; COUNTY COMMISSIONERS, 1, 3, 13; CRIMINAL LAW, 7, 23, 41; DECEDENTS' ESTATES, 1, 9; DISMISSAL; FEES AND SALARIES; LIQUOR LAW, 6; PRACTICE, 17; PROSECUTING ATTORNEY, 1; REPLEVIN BAIL, 6.

1. *Rule.*—The intention of legislators and the purpose of a statute ought not to be made to yield to one or more phrases, when the whole act evinces a different intention and purpose. *Cooper v. Metzger, 544*

2. *Criminal Statute.*—A criminal statute will not be extended by construction beyond what its terms fairly import. *Sumner v. State, 52*

STATUTE OF LIMITATION.

See REAL ESTATE, 9 to 12.

1. *Auditor of County.—Congressional Township School Fund.—Loan to Himself.—Bond.—Sureties.*—Where the auditor of a county drew a warrant in his own favor for one thousand dollars, as a pretended loan from the congressional township school fund, and received the money, a cause of action at once accrued on his bond, and a suit thereon, commenced more than three years thereafter, is barred by section 211 of the code. *Ware v. The State, ex rel., 181*
2. *Same.—County Commissioners.—Concealment.*—The right of action does not depend upon a knowledge of the facts by the county commissioners, but upon the existence of the facts themselves. If the facts constituted a breach of the bond, the statute commenced to run, not when the breach was discovered, but when it occurred. *Id.*
3. *Same.—Failure to Discover.—Silence of Party Liable.*—A failure to discover a cause of action does not, like its concealment, suspend the statute; and the mere silence of the party liable is not enough, but something must be done tending to prevent discovery. *Id.*

STREET.

See CITIES AND TOWNS, 1, 9; LIQUOR LAW, 3; NEGLIGENCE, 12.

SUBROGATION.

See REAL ESTATE, 6; REPLEVIN BAIL, 11.

SUMMONS.

See APPEARANCE; JUDGMENT, 2, 3; PRACTICE, 17.

SUPERIOR COURT.

See APPEAL BOND.

SUPERSEDEAS.

See PLEADING, 20.

SUPREME COURT.

See ASSIGNMENT OF ERROR; CRIMINAL LAW, 34, 35, 40; DECEDENTS' ESTATES, 2, 9; JURISDICTION, 5; PRACTICE, 21.

1. *Practice.—Instruction.—Record.*—Where an instruction complained of is set out in the motion for a new trial, but does not otherwise appear in the record, no question with reference thereto is properly presented to the Supreme Court. *Zehner v. Aultman, 24*
2. *Practice.—Dismissal for Want of Prosecution.—Change of Venue.—Continuance.*—Where the correctness of the ruling of the trial court in dismissing a cause for want of prosecution is not questioned, the Supreme Court will not go back of such ruling to consider assignments of error attacking the rulings refusing a change of venue and denying a continuance. *Robinson v. Wise, 46*
3. *Practice.—Exception.—When Taken.—Record.*—Section 343, 2 R. S. 1876, p. 176, imperatively requires an exception to the decision of the court to be taken at the time it is made, although time may be given to reduce the exception to writing; and, where the record entry on appeal shows an exception at one term to a ruling at a former term, no available question is reserved thereby. *Kolle v. Foltz, 54*
4. *Practice.—Evidence.—Bill of Exceptions.—Presumption.*—Where a question of law is reserved under section 347 of the code, the bill of exceptions must contain the evidence relating to the points of exception to a refusal of the court to permit certain questions to be asked a witness upon the trial of a cause; and, in the absence of such evidence, the Supreme Court will presume in favor of the ruling of the trial court. *Hedrick v. Hedrick, 78*
5. *Practice.—Complaint.—Assignment of Error.*—If one paragraph of a complaint be good, an assignment of error that the complaint does not state facts sufficient to constitute a cause of action will be unavailing. *Charlestown School Township v. Hay, 127*

6. *Same.—Presumption.*—Where the record does not show the issuing of any writ, nor an objection in the court below to the time of bringing the action, the Supreme Court will presume that the action was commenced when appearance was made and answer filed. *Ib.*
7. *Appeal Within one Year from July 2d, 1877.*—An appeal taken to the Supreme Court, June 27th, 1878, from a judgment rendered May 14th, 1877, was within one year from the time the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, took effect, and was in time, as such act took effect July 2d, 1877. *Evansville, etc., R. R. Co. v. Barbee, 169*
8. *Appeal.*—Under the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 59, amending section 561 of the practice act, an appeal to the Supreme Court must be taken within one year from the time the judgment is rendered. *McClintock v. Theiss, 200*
9. *Bill of Exceptions.*—A bill of exceptions is necessary to bring to the Supreme Court the evidence adduced at a trial, whether oral testimony, writings, documents, agreed facts, or other form of proof. This rule does not apply to an agreed case under section 386 of the code. *Martin v. Martin, 207*
10. *Same.*—The recital in a finding, that the “agreed facts” contain the evidence, is not a substitute for a bill of exceptions. *Ib.*
11. *Special Finding.—Request of Parties.*—It is only when the special finding was made at the request of one or both of the parties, that exceptions to the conclusions of law stated present any question for the consideration of the Supreme Court. *Ib.*
12. *Form of Judgment.*—An objection to the form of a judgment will not be considered by the Supreme Court, unless it was brought to the attention of the court below, by appropriate motion, at the time the judgment was entered, or, after its entry, by motion to modify and correct it. *Ib.*
13. *Issue on Appeal.—Trial by the Record.—Argument of Counsel.*—To entitle an appellant to prevail in the Supreme Court, “error in the record” must be made “manifest” by the record, not by argument of counsel. *Ib.*
14. *Burden on Appellant.—Silence of Appellee.*—While the Supreme Court will not go beyond the brief of the appellant to search the record in quest of errors not pointed out therein, the silence of the appellee on any point is not equal to an agreement to waive the point. The burden is on the appellant to show the error which he has assigned. *Ib.*
15. *Practice.—New Trial.*—Matters assigned as causes for a new trial, and set out in the motion therefor, can not be taken as true statements, if they appear nowhere else in the record. *McDonald v. State, 214*
16. *Same.—Bill of Exceptions.—Special Instructions.—Oral Instructions.*—Alleged erroneous action of the trial court in refusing to instruct the jury specially as asked, and in modifying the several instructions asked without putting the modifications in writing, and in instructing the jury orally, must be shown in the record either by a bill of exceptions or in some other manner authorized by law. *Ib.*
17. *Practice.—New Trial.—Assignment of Error.*—Where rulings of the trial court constitute proper grounds for a new trial, they can not be assigned on appeal as independent errors. If presented to the trial court by the proper motion, they are covered by an assignment on that motion; if not so presented they can not be made available in the Supreme Court in any manner. *Allen v. State, 216*
18. *Practice.—Bill of Exceptions.—Record.*—Where full information and all essential facts are shown in the record, no bill of exceptions is necessary. *Doctor v. Hartman, 221*
19. *Same.—Omission of Evidence.*—Where a bill of exceptions affirmatively shows that it does not contain all the evidence, this court will

- not consider any question which requires for its full understanding and correct decision an examination of the entire evidence given on the trial, even though it contain the statement that "this was all the evidence given upon the trial of the cause." *Johnson v. Wiley*, 233
20. *Same.—Practice.*—It is always necessary for one who complains of the ruling of a trial court, to bring to the appellate court a record fully and clearly showing that there was error in the proceedings or judgment appealed from; but where the questions presented may be determined as well without the entire evidence as with it, this court will consider and decide them, although all the evidence is not in the record. *Ib.*
21. *Same.*—In order to present a question upon the exclusion of testimony, where the evidence is not all contained in the bill of exceptions, it must affirmatively appear that the omitted evidence does not directly bear upon or affect the ruling excluding the testimony. *Ib.*
22. *Transcript.—How Corrected.*—A transcript in the Supreme Court, if defective, can only be corrected by a *certiorari*. *Sumner v. Goings*, 293
23. *Same.—Appeal.—Record.—Complaint.—Answer.*—Unless the record on appeal contains a copy of the complaint, the Supreme Court cannot determine the sufficiency of an answer thereto. *Ib.*
24. *Practice.—Bill of Exceptions.—Evidence.*—Written instruments or documentary evidence may be incorporated in a bill of exceptions by indicating the place where they are to be inserted by the words "here insert," but the only way in which oral testimony can be properly got into a bill of exceptions is by copying it therein at full length before the bill is signed by the judge. *Stratton v. Kennard*, 502
25. *Practice.—Evidence.*—Where there is no conflicting testimony shown by the record, on appeal, the Supreme Court will weigh the evidence and give it such effect as in its judgment should have been given by the trial court. *Taylor v. Lohman*, 418
26. *Practice.—Instructions not Signed by Judge.—Bill of Exceptions.—Order of Court.*—Where there is no bill of exceptions, nor order of the court, whereby instructions given to the jury are made a part of the record, and they are not signed by the judge, they are not properly in the record. *Swift v. Raliff*, 426
27. *Practice.—Motion to Strike Out.*—Overruling a motion to strike out part of a complaint is not available error on appeal. Where the matters objected to were parts of the transaction charged as negligence, a motion to strike them out was correctly overruled. *City of Greencastle v. Martin*, 449
28. *Same.—Instructions.—Waiver.*—Objections to instructions not argued in the brief, nor supported by authority, are waived. *Ib.*
29. *Brief.—Waiver.*—Error which is not pointed out or discussed in the brief of the party assigning it will be regarded as waived by the Supreme Court. *Pittsburgh, etc., R. R. Co. v. Williams*, 462
Stanton v. State, ex rel., 503
30. *New Trial.*—Questions arising under reasons assigned for a new trial, not discussed by counsel in the Supreme Court, will be regarded as waived. *Pittsburgh, etc., R. R. Co. v. Williams*, 462
31. *Practice.—Answers to Interrogatories.*—Where the answers to interrogatories show that the jury found for the plaintiff upon a good paragraph of complaint, the Supreme Court will not consider the sufficiency of the other paragraphs thereof. *Trammel v. Chipman*, 474
32. *Identical Paragraphs of Complaint.—Refusal to Compel Election.—Harmless Error.*—No available error is committed by the refusal of the trial court to compel a plaintiff to elect between two paragraphs of his complaint, though they be word for word the same, and admitted to be for the same cause of action. *Ib.*

33. *Practice.—Overruling Motion to Strike Out.*—A judgment will not be reversed on account of overruling a motion to strike out parts of a pleading. *Stanton v. State, ex rel., 503*
34. *Sustaining Motion to Strike Out.*—An error in sustaining a motion to strike out can not be cured in the introduction of the testimony, and, when properly in the record, ought to be considered. *Ib.*
35. *Bill of Exceptions.*—Matter struck out of a pleading on motion can be put into the record again only by being copied into a bill of exceptions. *Ib.*
36. *Bill of Exceptions.—Evidence.*—The grounds of objections to the admissibility of evidence must be specifically stated to the trial court, and the bill of exceptions must exhibit them as stated, to present the question in the Supreme Court. *City of Delphi v. Livery, 520*
37. *Practice.—Harmless Error.*—The overruling of a demurrer to a bad answer to an insufficient complaint is not such error as will justify or authorize a reversal of the judgment. *Vert v. Voss, 565*
38. *Practice.—Motion to Suppress Depositions.—How Made Part of Record.*—A motion to suppress depositions and the ruling of the court thereon must be made a part of the record by a bill of exceptions or order of court, to properly constitute a part of the record on appeal. *Smith v. Kyler, 575*
39. *Pleading Struck Out.—How Made Part of Record.*—When a pleading, or any part thereof, has been struck out or rejected, such pleading or part thereof will not thereafter constitute a part of the record, unless made such by bill of exceptions or by order of court. *Ib.*
40. *New Trial.—Assignment of Causes.*—Where matters constituting proper causes for a new trial are not assigned as such in a motion therefor, their assignment as error on appeal presents no question for the decision of the Supreme Court. *Ib.*
41. *Assignment of Error.—Verdict.*—An assignment of error, that the court erred in rendering judgment on the verdict, does not question the correctness of the verdict, and presents no question for the decision of the Supreme Court. *Ib.*
42. *Judgment.—Objections to Form.*—Objections to the form or substance of a judgment can not be presented for the first time in the Supreme Court. *Ib.*
43. *Practice.—Instructions.—When not Part of Record.—Motion for New Trial.*—Instructions, whether given or refused, can not be made a part of the record by setting them out or copying them in the motion for a new trial, as a cause therefor. A recital in the motion for a new trial, that instructions asked for had been refused by the court, can not be taken as true by the Supreme Court, unless the truth thereof be properly shown elsewhere by the record. *Ib.*
44. *Instructions Refused.—Presumption.—Record.*—Where the instructions of the court, given of its own motion, are not made a part of the record, and are not found in the transcript, the Supreme Court will presume that other instructions asked for and refused were properly refused by the trial court. *Ib.*
45. *Objection to Evidence.—Practice.*—Where the record fails to show the ground of objection to the admission of evidence, the Supreme Court will not consider the question of the admissibility of the evidence, nor the objections made thereto in the Supreme Court. *Ib.*
46. *Absence of Evidence.—Presumption.—Instructions.*—Without the evidence in the record the Supreme Court can not judge of the applicability of instructions, or know that they were or were not pertinent to the evidence, and in such condition of the record will assume that the trial court did right. Error will not be presumed, but must be affirmatively shown. *Dyer v. State, 594*

47. *Practice.—Evidence.—Finding.*—Where there is evidence in the record tending to sustain the finding of the trial court, the Supreme Court will not disturb the finding on a mere preponderance of the evidence.
Cosby v. Anderson, 600

SURETY.

See DITCHES AND DRAINS, 9; PLEADING, 6, 26; PRACTICE, 20, 21; PROMISSORY NOTE, 4, 6; REAL ESTATE, 6; STATUTE OF LIMITATIONS.

TAX TITLE.

See TAXES.

Interest on Taxes Paid by Holder.—The holder of an invalid tax title to land sold for taxes is entitled to twenty-five per cent. interest per annum on the amount of taxes paid by him on such land, under section 257 of the act relating to the assessment of taxes, 1 R. S. 1876, p. 72.
Hosbrook v. Schooley, 51

TAXES.

See ALIEN, 3, 5, 6, 7; CITIES AND TOWNS, 3 to 7; REAL ESTATE, 9 to 13;

TAX TITLE.

Evidence.—Tax Deed.—Personalty Should be First Exhausted.—Testimony of Auditor of County.—Where a tax deed fails to show that the personal property of the delinquent had been exhausted before the sale of his real estate, or that he had no such property, such deed is not admissible as evidence of title until such facts are shown *aliunde*; and the testimony of the auditor of the county where such real estate is situate, "that the records in his office showed that there was no personal property assessed" to the delinquent in but one of two years for which the taxes on the real estate became delinquent, is insufficient to prove the facts necessary to entitle the deed to be admitted in evidence.
Smith v. Kyler, 575

TENDER.

See SCHOOL LAW.

TERM OF IMPRISONMENT.

See CRIMINAL LAW, 16.

TITLE BOND.

See REAL ESTATE, 5, 6.

TOWN.

See CITIES AND TOWNS.

TOWNSHIP TRUSTEE.

See CONSIGNMENT; CONTRACT, 1; EVIDENCE, 3; PLEADING, 13; PROMISSORY NOTE, 1.

TRANSCRIPT.

See JUDGMENT, 1; SUPREME COURT, 22.

TRUSTS.

1. *Lands Bought by Wife.—Husband as Trustee.—Purchaser for Valuable Consideration Without Notice.*—Where a wife bought land and paid for it with money of her own separate estate, and, either by agreement at the time, or without her knowledge or consent, it was conveyed to her husband, and held by him, and she made lasting and valuable improvements on it, and paid for them with her separate money, the husband held the land as trustee for her; but such trust could not defeat the title of a purchaser for a valuable consideration and without notice of the trust.
Derry v. Derry, 560
2. *Same.—Second Wife.—Title by Descent.*—Where, in such case, the husband survives the wife and marries again, holding such trust land, his second wife, on his death intestate, takes by descent, and not by purchase, and is bound by such trust, whether she had notice of it or not.
Id.

3. *Same.—Widow.—Descent.*—Under our statutes, where a wife takes an interest in the lands of her deceased husband by descent, she is not within section 2 of the statute. 1 R. S. 1876, p. 915, which declares that no trust concerning lands shall defeat the title of a purchaser for a valuable consideration, without notice of the trust. *Ib.*
4. *Same.—Second Wife.—Survivorship.—Child of Marriage.*—Survivorship and a child of the marriage are required to entitle a second wife to a fee simple in the lands of her husband. *Ib.*

UNITED STATES COURT.

See PRACTICE, 14 to 16.

VARIANCE.

See CRIMINAL LAW, 6, 14, 28; REAL ESTATE, ACTION TO RECOVER, 4.

VENDOR'S LIEN.

See REAL ESTATE, 5.

1. *Mortgagee.—Notice.*—In an action to enforce a vendor's lien, an averment in the cross complaint of a mortgagee, that "he had no notice" that the purchase-money or any part thereof was unpaid, is sufficient on demurrer. *Richards v. McPherson, 158*
2. *Same.—Waiver.—Mortgage.*—The holder of a vendor's lien, by taking a mortgage to secure the unpaid purchase-money, waived his vendor's lien, and, having satisfied his mortgage and taken the note of a subsequent purchaser in lieu of it, he can not revive such lien. *Ib.*
3. *Same.—Equitable Lien.—Abandoned Once, Abandoned Forever.*—An equitable lien for purchase-money, once fairly and voluntarily abandoned, is abandoned forever. *Ib.*

VENDOR AND PURCHASER.

Purchase-Money of Real Estate.—Defence on Failure of Title.—In the absence of covenants of warranty or for title, or proof of fraud, a failure of title is no defence to an action for the purchase-money of real estate. *Stratton v. Kennard, 302*

VENIRE DE NOVO.

1. *Practice.*—A motion for a *venire de novo* is proper only when there is some defect in the verdict of the jury or the finding of the court, and must be made before judgment. *McClintock v. Theiss, 200*
2. *Same.*—A *venire de novo* is not the proper method to raise the question of the sufficiency of an answer to an interrogatory; but the party should object to receiving the verdict until the question has been properly answered, and, if his objection be overruled, should save his exception to that ruling. *West v. Cavins, 265*

VENUE.

See CHANGE OF VENUE; CRIMINAL LAW, 46.

VERDICT.

See CONTRACT, 3; CRIMINAL LAW, 17; INTERROGATORIES TO JURY; JURY; PLEADING, 20; PRACTICE, 18; RAILROAD, 3; SPECIAL FINDING; SUPREME COURT, 41.

Defects Cured by Verdict.—Where the statement of the plaintiff's cause of action, and that only, is defective or inaccurate, the defect is cured by a general verdict in his favor. *Smock v. Harrison, 348*

VIEWERS—REVIEWERS.

See COUNTY COMMISSIONERS, 6 to 9; DITCHES AND DRAINS, 4.

VOLUNTARY PAYMENT.

See COSTS.

WAGERING.

See CRIMINAL LAW, 7.

WAIVER.

See APPEAL BOND; DECEDENTS' ESTATES, 2; JURISDICTION, 5; PROSECUTING ATTORNEY, 1; SUPREME COURT, 28, 29; VENDOR'S LIEN, 2, 3.

WIDOW.

See PARTITION, 2, 3, 6; REAL ESTATE, 5, 7, 8; TRUSTS, 2 to 4; WILL, 1, 2, 5.

WILL.

See JUDGMENT, 8; MORTGAGE, 11; PARTITION, 4; PROMISSORY NOTE, 2.

1. *Widow's Election.—Statute of Descents.*—Sections 27 and 41 of the statute of descents, 1 R. S. 1876, p. 408, taken together, mean that when a substantial provision is made for the widow by the will of her late husband, she can not, in the absence of a plainly expressed intention to the contrary, take both under the will, and under the statute. In such event, she has the option simply of taking under the one or the other, as she may prefer. *Armstrong v. Berreman*, 13 Ind. 422, distinguished. *Ragsdale v. Parrish*, 191
2. *Same.—Relinquishment of Claim.—Real Estate.*—A widow's election to take under the will operates as a relinquishment of all other claims to the testator's real estate. *Ib.*
3. *Action to Set Aside.—Evidence.—Conversations.—Practice.*—Upon the trial of an action to set aside a will, on account of the alleged mental unsoundness of the testator and the use of undue influence, it is not error to exclude conversations of the testator, which do not tend to prove either unsoundness of mind or the exercise of undue influence. *Vance v. Vance*, 570
4. *Same.—Instruction.—Practice.—Directing Verdict.—Evidence.*—Where, in such case, the evidence submitted to the jury is insufficient to entitle the plaintiff to a verdict, it is the duty of the court to instruct the jury to return a verdict for the defendant. *Ib.*
5. *Construction of.—Devise During Widowhood.—Life-Estate.—Power of Widow as Executrix to Sell Real Estate for Support of Children.—Decedents' Estates.*—A testator devised to his widow the residue of his estate after the payment of debts, "to have and hold and use as her own for the benefit of herself and family, so long as she remains my widow," and in case she should marry again, "then it is my will that she should only take what the law provides for widows of men who die intestate, and that the residue be divided among my children, according to law." The will also provided that if the widow remained unmarried until her death, then all the residue of his estate should be sold at public sale, and the proceeds equally divided among his children, taking into consideration advancements made by him, or which his widow might make, to any of the children.
Held, that the property was devised to the widow only so long as she should remain the testator's widow, and that, if she took under the will, she would take but a life-estate in the real estate, in case she should remain unmarried.
Held, also, that such widow, as executrix of the will, could not convert the real estate, or any part thereof, into money, for the support of herself and children, or for the payment of debts contracted by her for such support. *Tate v. McLain*, 423
6. *Devisee.—Compromise.—Admission of Validity.—Estoppel.*—The mere fact that a devisee paid all the devised lands are worth, to obtain from the heirs an admission by decree, in an action to set the will aside, that the will is a valid instrument, and binding upon the parties to the compromise agreement, does not impair the force or effect of the admission after it has been made; and, while such adjudication stands, such heirs are precluded from reasserting the invalidity of the will collaterally. *Jones v. Rhoads*, 510

WITNESS.

See EVIDENCE, 7, 8, 12; HUSBAND AND WIFE, 3; PRACTICE, 22.

WRITTEN INSTRUMENT.

See PLEADING, 16; SUPREME COURT, 24.

END OF VOL. 74.

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